

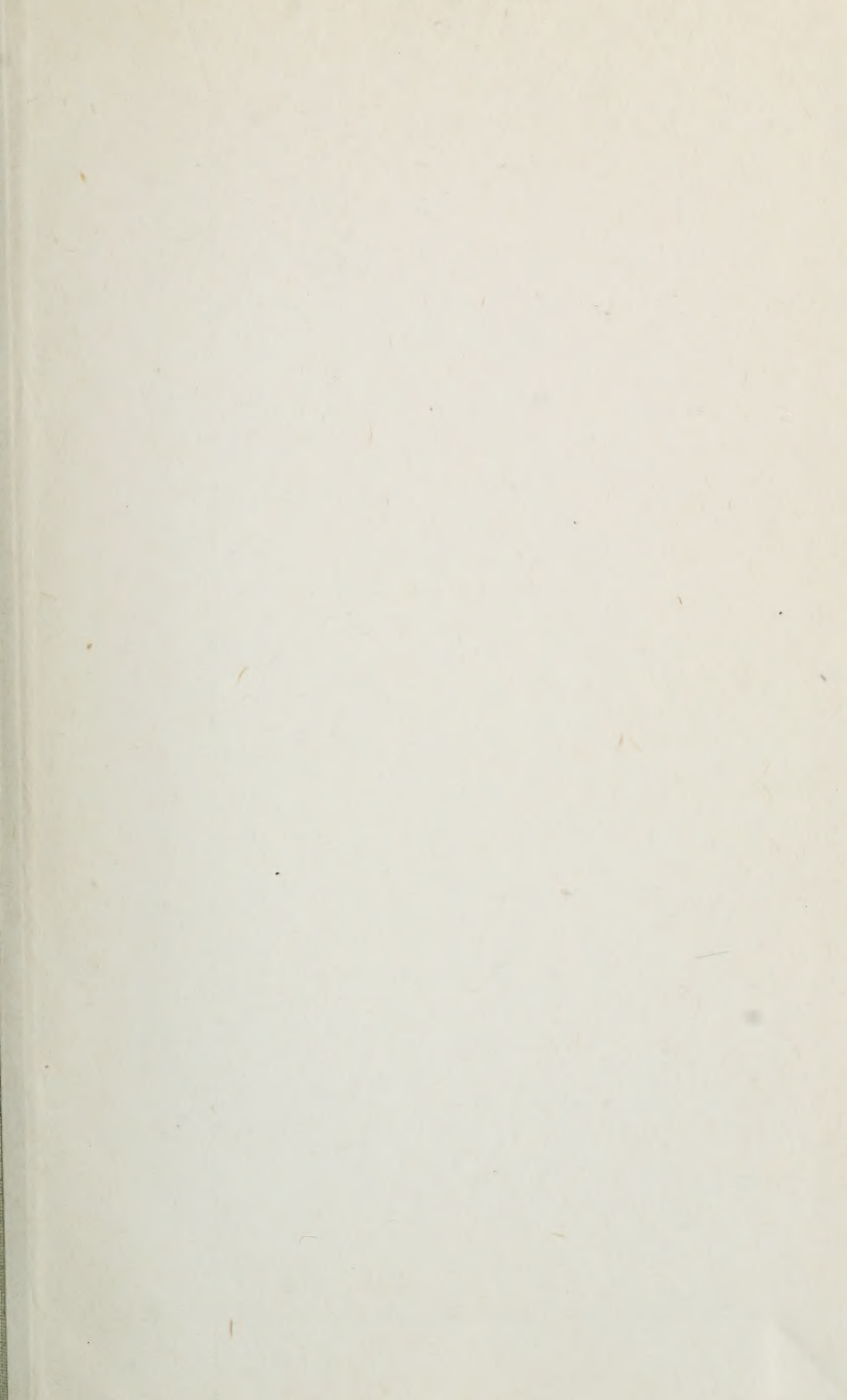
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10. 2425
No. 10964

United States
Circuit Court of Appeals
For the Ninth Circuit.

SIVEAR WILLARD LINDSTROM,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.


Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Southern Division

FILED

APR 23 1945

PAUL P. O'BRIEN,
CLERK



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No. 10964

United States
Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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COUNSEL OF RECORD

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Attorneys for Defendant-Appellant

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United States Attorney

HARRY SAGER, ESQ.

Assistant United States Attorney
324 Federal Building, Tacoma, Washington
Attorneys for Plaintiff-Appellee.

United States District Court, Western District
of Washington, Southern Division

July, 1944, Term

No. 15653

UNITED STATES OF AMERICA,
Plaintiff,
vs.

SIVEAR WILLARD LINDSTROM,
Defendant.

INDICTMENT

Vio. Selective Training & Service Act of 1940, and
the Rules and Regulations pursuant thereto

United States of America,
Western District of Washington
Southern Division—ss.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Southern Division of the Western District of Washington, upon their oaths present:

COUNT ONE

That Sivear Willard Lindstrom, whose true name other than as given is to these grand jurors unknown, on or about the 13th day of May, A. D. 1944, and continuing to the date of this indictment, at Puyallup, Washington, then and there being, did then and there knowingly fail and neglect and refuse to perform a duty required of him under the Selective Service Training and Serv-

ice Act of 1940, and the rules and regulations thereunder, in that he, the said Sivear Willard Lindstrom, did knowingly, wilfully, unlawfully and feloniously fail, neglect and refuse to present himself for induction into the United States armed forces at the time and place specified, when directed to do so by the Selective Service Board No. 1, Pierce County, Puyallup, Washington, having theretofore been directed by said Board so to do, the said Board then and there having authority to make such direction of induction, and he, the said Sivear Willard Lindstrom, [1*] then and there being a selected man as defined in said Act, and the Rules and Regulations thereunder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

J. CHARLES DENNIS

United States Attorney

HARRY SAGER

Assistant United States Attorney

INDICTMENT

Violation: Selective Training and Service Act of 1940, and the Rules and Regulations thereunder.

A True Bill,

O. F. LAGASSE,

Foreman

J. CHARLES DENNIS

United States Attorney

*Page numbering appearing at foot of page of original certified Transcript of Record.

Copy endorsed:

Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court Oct. 25, 1944, Judson W. Shorett, Clerk. By Gladys Chitty, Deputy [2]

[Title of District Court and Cause]

VERDICT

We, the jury empanelled in the above-entitled cause, find the defendant, Sivear Willard Lindstrom is Guilty as charged in Count I of the Indictment herein.

Dated this 6 day of December, 1944.

(Signed) BENJAMIN ROTH
Foreman

Recommend leniency

[Endorsed]: Filed Dec. 6, 1944 [3]

United States District Court, Western District
of Washington, Southern Division

No. 15653

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIVEAR WILLARD LINDSTROM,

Defendant.

JUDGMENT AND SENTENCE

Comes now on this 2nd day of January, 1945, said defendant, Sivear Willard Lindstrom, into open court with his attorneys, S. J. O'Brien and Ralph Rogers, for sentence, after having been found guilty of the offense charged in Count I of the Indictment herein by verdict of a jury duly and regularly empanelled to hear the said cause, and being informed by the court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

Wherefore, by reason of the law and the premises, it is

Ordered and Adjudged by the Court that the said defendant, upon the verdict of the jury, is guilty as charged in Count One of the Indictment herein, and that he be committed to the custody of the Attorney General of the United States of

America for imprisonment in such penal institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Fifteen (15) Months. [4]

And the said defendant is hereby remanded into the custody of the United States Marshal for this District for delivery to the Warden, Superintendent or other person in charge of such institution as the Attorney General of the United States may by law designate for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done in Open Court this 2nd day of January, 1945.

CHARLES H. LEAVY

United States District Judge.

Presented by:

HARRY SAGER,

Assistant United States

Attorney

Violation: Selective Training & Service Act of 1940, and the Rules & Regulations pursuant thereto.

[Endorsed]: Filed Jan. 2, 1945. [5]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now the defendant, Sivear Willard Lindstrom, and moves this Honorable Court on the records and files herein for an order granting him a new trial in the above entitled action upon each of the following grounds:

I.

That the verdict of the jury is against the law and is not supported by the evidence.

II.

That the Court committed numerous errors in ruling upon the admissibility of evidence, all of which were highly prejudicial to the defendant and were duly excepted to by him, including the following:

1. The Court erred in admitting, over the objection of the defendant on the ground that it was incompetent and had not been properly identified, that certain telegram purportedly sent by the defendant to the President of the United States.

2. That the Court erred in permitting the District Attorney to examine the witness, Jean Schonborn, over the [6] objections of the defendant, relating to matters of classification and changes in classification as a registrant under the Selective Service Act in the year 1941, and particularly in permitting the District Attorney to show that the

defendant had been classified as 1-A and had thereafter procured a deferment and had his classification changed; that said testimony was duly objected to on the ground of its being irrelevant, immaterial and incompetent and it was highly prejudicial to the defendant.

3. The Court erred in rejecting the defendant's offer of proof, by which he offered to prove that in August, 1944, he called upon his attorney and had said attorney write a letter for him to Mr. Boardman, with copies to certain officials administering the Selective Service Act and in refusing to permit the defendant to produce said letter in evidence.

III.

That there was misconduct on the part of the jury in that upon interrogation of Mr. John Holland, called as Juror No. 12, said juror made statements in open Court and before all the other jurors to the effect that he had sons in the Service and would be prejudiced against anyone charged with violating the Selective Service Act, and that such a person would have two strikes against him from the start.

IV.

That the Court erred and abused its discretion in admonishing and criticizing all jurors in open Court that they should not have prejudice in such a case as the direct effect and result of the critical statements made by the [7] Court would be and were to restrain any juror from revealing his prejudice to the Court and the defendant and at the time it

clearly appeared that there were persons with prejudice because two jurors had already been excused by the Court because of their admissions in open Court that they were prejudiced against the defendant in this case.

V.

That the Court erred in giving certain instructions duly excepted to at the time by the defendant.

VI.

That the Court erred in refusing to give instructions requested by the defendant, and the failure to give said instructions being excepted to by the defendant.

S. J. O'BRIEN

RALPH M. ROGERS

Attorneys for the Defendant

Copy received Dec. 8, 1944.

HARRY SAGER,

Asst. U. S. Atty.

[Endorsed]: Filed Dec. 8, 1944 [8]

In the United States District Court, Western District of Washington, Southern Division.

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 22nd day of December, 1944, the Honorable

Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court, to-wit:

No. 15653

[Title of Cause]

RECORD OF HEARING RE MOTION FOR
NEW TRIAL

Now on this 22nd day of December, 1944, this cause comes on for hearing on motion for new trial. Harry Sager, U. S. Attorney, represents the Government. Defendant is in court represented by counsel, S. J. O'Brien and Ralph Rogers. Argument is had on motion for new trial by Mr. O'Brien and Mr. Rogers. The Court now denies motion for new trial and allows an exception. * * * [8a]

[Title of District Court and Cause]

NOTICE OF APPEAL

Name and address of appellant: Silvear Willard Lindstrom, 2801 Portland Avenue, Tacoma, Washington.

Name and address of appellant's attorney: S. J. O'Brien, 1516 Puget Sound Bank Bldg., Tacoma, Washington.

Offense: Violation of the Selective Training and Service Act of 1940 and the rules and regulations thereunder.

Date of Judgment: January 2, 1945.

Brief description of judgment and sentence: "That defendant be committed to the custody of the Attorney General of the United States for imprisonment in such penal institution as the Attorney General of the United States or his authorized representative may by law designate for the period of 15 months." Name of prison where now confined if not on bail: On bail.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

SILVEAR WILLARD
LINDSTROM
Appellant.

Dated this 3rd day of January, 1945.

GROUND OF APPEAL

I.

Errors committed by the trial court in overruling objections by the defendant to evidence offered by the plaintiff, which were duly excepted to by defendant and particularly including the following:

(a) The reception in evidence over objection of the appellant of a purported telegram alleged to have been sent by appellant to the President of the United States relating to defendant's selective service status, which telegram was not identified by any official certificate or by any persons who had knowl-

edge that said telegram had been received by the President or had been sent by the defendant.

(b) Error committed, over objection by the defendant, in permitting a witness for the plaintiff to testify generally concerning the classification and draft status in 1941, 1942, and 1943, and particularly in permitting said witness to testify that defendant had been classified 1-A, and thereafter procured a deferment and had his classification changed.

(c) Error committed by the trial court in rejecting the defendant's offer to prove that in August, 1944, his attorney, by his direction, wrote a letter to one Boardman, an agent of the F.B.I., in response to a letter written by Boardman, which letter referred to the attitude of the defendant with reference to his selective service status.

II.

Error committed by the trial court during the course of the selection of the Jury, under the following circumstances: John Holland, a prospective Juror, in response to a general question submitted by the Court to the Jurors drawn, and previous to any examination by the defendant's counsel, stated [10] in open Court, that he would be prejudiced against anyone charged with violating the Selective Service Act, and that such person would have two strikes against him from the start. One other Juror made a similar statement. Thereupon the Court, in the presence of the entire panel, admonished all the Jurors that they should not have

prejudice of this nature in such a case. The effect of the criticism and admonishment thus rendered by the Court was to prevent defendant's counsel from thereafter developing the existence of prejudice on the part of any other Jurors, and thereby preclude the intelligent exercise by defendant's counsel of his preemptory right of challenge.

III.

Error committed by the Court in refusing to give instructions requested in writing by the defendant.

IV.

Error committed by the Court in giving certain instructions duly excepted to by the defendant previous to the retirement of the Jury.

V.

Error committed by the Court in denying defendant's motion for a new trial and in entering a judgment and sentence upon the verdict of the Jury.

Copy received this 3rd day of January, 1945.

HARRY SAGER

Assistant U. S. District Atty.

[Endorsed]: Filed January 3, 1945 [11]

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME TO
FILE PROPOSED BILL OF EXCEPTIONS

Comes now the appellant herein and moves the Court under the provisions of Rule 9 of the Crim-

inal Appeals Rules that the time within which the appellant may file his proposed Bill of Exceptions herein be extended for a period of not less than thirty days.

This motion is based upon the affidavit of S. J. O'Brien, which is attached hereto and by reference made a part hereof, and upon the records and files herein.

S. J. O'BRIEN

Attorney for Appellant

[Endorsed]: Feb. 1, 1945. [12]

[Title of District Court and Cause]

AFFIDAVIT

State of Washington

County of Pierce—ss.

S. J. O'Brien, being first duly sworn on oath deposes and says: I am attorney for the appellant herein and on his behalf am prosecuting an appeal to the Circuit Court of Appeals of the Ninth Circuit from a certain final judgment of conviction entered herein against the appellant on the 2nd day of January, 1945.

As appears from the Notice of Appeal on file herein, the assignments of error which will be filed by the appellant in connection with the prosecution of such appeal will make it necessary to prepare and have included in the record a substantial portion of the evidence and the record and pro-

ceedings taken at the trial, which the appellant is not able to do from written notes taken by affiant during the progress of the trial. Acting on behalf of the appellant affiant on the 2nd day of January, 1945, ordered from Russell N. Anderson, the court reporter who reported the proceedings at said trial, a transcript of such proceedings, and requested that such transcript be forthwith and immediately prepared. The said Russell N. Anderson, however, during [13] a substantial portion of the time since said order, has been continuously engaged in reporting trials and proceedings in this court and has not been able to comply with affiant's request until the 20th day of January, 1945, when he furnished affiant with a typewritten transcript of such proceedings. That for such reason, which is not on account of any fault of either appellant or affiant, it is not possible to prepare and file in this court a proposed bill of exceptions and that a period of not less than thirty (30) days is reasonably required in which to prepare and file such proposed bill of exceptions.

S. J. O'BRIEN

Subscribed and sworn to before me this 24th day of January, 1945.

J. L. SNAPP

Notary Public in and for the State of Washington,
residing at Tacoma. [14]

[Title of District Court and Cause]

ORDER

Upon motion of the appellant,

It Is Ordered, that the time within which appellant may file his proposed Bill of Exceptions herein be and the same is hereby extended to the 2nd day of March, 1945.

Done in open Court this 1st day of February, 1945.

CHARLES H. LEAVY

District Judge.

Approved:

HARRY SAGER

Asst. U. S. District Attorney

[Endorsed]: Filed Feb. 1, 1945. [15]

[Title of District Court and Cause]

BAIL BOND UPON APPEAL

Know All Men By These Presents:

That I, Sivear Willard Lindstrom, as Principal, having deposited the sum of Fifteen Hundred (\$1500) and No/100ths Dollars, in cash, with the Clerk of the United States District Court, Southern Division, Tacoma, Washington, for bail on appeal, is held and firmly bound unto the United States of America in the full and just sum of Fifteen Hundred (\$1500.00) Dollars, to be paid to the United States of America, to which payment, well and truly

to be paid, I bind myself, my heirs, executors, administrators, successors and assigns, and the said sum of Fifteen Hundred (\$1500.00) Dollars, entirely by these presents.

Sealed hereinbelow with my seal and dated this 3rd day of January, in the year of our Lord one thousand nine hundred and forty-five.

Whereas, in the District Court of the United States for the Western District of Washington, Southern Division, in the case pending in said Court between United States of America, as plaintiff, and Sivear Willard Lindstrom, as defendant, being numbered 15653 of the records of the office of the Clerk of said Court, the jury returned a verdict of guilty against the said Sivear Willard Lindstrom, adjudging him guilty as charged on Count 1 of the indictment in *said* [16] *charging* him with violation of the Selective Training & Service Act of 1940, and the rules and regulations thereunder; and

Whereas, the said Sivear Willard Lindstrom was thereafter and on the 2nd day of January, 1945, duly sentenced by the Court to the custody of the Attorney General of the United States, to be confined in some penitentiary, designated by the Attorney General, for the period of fifteen (15) months, and that formal judgment and sentence having been filed in the office of the Clerk of the above entitled Court against the said Sivear Willard Lindstrom; and

Whereas, the said Sivear Willard Lindstrom, principal herein, desires to appeal from such judg-

ment and sentence, so rendered in the above entitled cause against him, to the United States Circuit Court of Appeals for the Ninth Circuit; and

Whereas, the said Sivear Willard Lindstrom, principal, intends to diligently pursue all steps in prosecuting an appeal from the said judgment and sentence;

Now Therefore, the condition of the above obligation and recognizance is that if the said Sivear Willard Lindstrom shall personally appear before the United States District Court for the Western District of Washington, Southern Division, in the City of Tacoma, Washington, from day to day and from term to term as may be ordered by the Court, and then and there obey the judgment of said Court and not depart from the jurisdiction of said Court without leave therefrom; and shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, or such city as shall [17] be designated by the said court for the hearing of said appeal, on such day or days as may be appointed therefor, and shall diligently prosecute the said appeal and abide by and obey all the orders of the said United States Circuit Court of Appeals in said cause and shall surrender himself in execution of the judgment or sentence appealed from, if said judgment and sentence be affirmed or the writ of error on appeal be dismissed; and if he shall appear for trial in the District Court for the Western District of Washington, Southern Division, on

such day or days as may be appointed for a retrial of said cause, and shall abide by and obey all orders made by said court and render himself in execution of the judgment of said Court, then the above obligation to be void; otherwise to be and remain in full force, virtue and effect.

[Signed] SIVEAR WILLARD
 LINDSTROM
 Principal.

State of Washington,
County of Pierce—ss.

On the 3rd day of January, 1944, before me personally appeared Sivear Willard Lindstrom, to be known to be the individual described in and who executed the within instrument and on oath stated that he signed the same freely and voluntarily for the uses and purposes therein stated.

Witness my hand and official seal, the day and year in this certificate first above written.

[Signed] STEPHEN J. O'BRIEN,
[Seal] Notary Public in and for the State of
 Washington, residing at Tacoma.

Approved as to form, January 3rd, 1945.

[Signed] HARRY SAGER
 Assistant U. S. District Atty.

Approved January 3, 1945.

 CHARLES H. LEAVY,
 District Judge

[Endorsed]: Filed January 3, 1945. [18]

[Title of District Court and Cause]

ASSIGNMENT OF ERRORS

Comes now Sivear Willard Lindstrom, appellant herein, and pursuant to the rules of this court and contemporaneously with the filing of the Bill of Exceptions herein, sets forth the following assignments of error asserted by the appellant and intended by him to be urged on the appeal of this action.

I.

The Court erred in refusing to permit appellant to testify that he laid all the facts and circumstances with relation to his legal duty to respond to an induction notice before his attorney, Ralph M. Rogers, and that he was advised by his said attorney that the matter was in the hands of the United States Attorney and that said attorney would advise the appellant when anything would come up with reference to it. The substance of the evidence rejected in connection with this was substantially as follows: Appellant offered to prove that when he received a notice of reclassification in 1-A, that he consulted with his attorney, Ralph M. Rogers, and that Ralph M. Rogers wrote a letter to a special agent of the Federal Bureau of Investigation, sending copies thereof to the local draft board of appellant and the State head of the selective service, which letter stated the facts with [19] reference to appellant's draft status. Appellant further offered to prove that he received a letter from L. V. Boardman, special agent in charge for the F. B. I.,

which advised his said attorney that an additional copy of this letter had been sent to the United States Attorney and that further action to be taken by the bureau would be ascertained from the United States Attorney. The Court denied this offer of proof in the following language: "I shall deny the offer of proof, except insofar as it deals with the letter from the special agent in charge, if the defendant himself says that he saw the letter, but the letter written by Mr. Rogers detailing the history of the case and the basis upon which deferment was asked would not be competent." To this ruling the appellant's attorney then inquired what the ruling of the court would be concerning the offer to prove the advice given to appellant by his attorney to the effect that the attorney would let him know when he heard from the United States Attorney. The Court rejected this offer but allowed the letter of the special agent of the F.B.I. to be received in evidence. The grounds urged for the admission of this evidence at the trial were that this evidence went to the question of whether or not appellant wilfully refused to report for induction as required by the notice of induction.

II.

The Court erred in admitting and receiving in evidence plaintiff's exhibit No. 18. The full substance of the evidence relating to the admission in evidence of said exhibit is as follows: Upon cross examination of appellant, the District Attorney exhibited to the appellant's exhibit 18, which pur-

ported to be a copy of a telegram dated [20] March, 1944, from appellant to the President of the United States, which telegram purported to set forth the financial condition of appellant and also stated that the person sending the telegram would not appear for pre-induction as he considered it a trick of the board. Appellant testified that he had sent a telegram to the President relating to this matter but denied that exhibit 18 was a correct copy of the telegram, and specifically denied that he had stated in the telegram that he would not report for pre-induction, or that he considered it a trick of the board. Appellant's counsel objected to the admission of this telegram in evidence upon the ground that it was not properly identified, which objection was sustained by the Court. Thereafter the Clerk of appellant's draft board took the witness stand and testified that the local draft board had received the telegram from state headquarters and that it was a part of the witnesses official files. Appellant again objected upon the ground that the exhibit was not properly identified and upon the further ground that it was not the best evidence. This objection was overruled by the Court and the exhibit was received in evidence.

S. J. O'BRIEN

Attorney for Appellant

Receipt acknowledged this 1st day of March, 1945.

HARRY SAGER

Assistant U. S. Attorney.

[Endorsed]: Filed March 1, 1945 [21]

[Title of District Court and Cause]

CLERK'S CERTIFICATE

I Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 20, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause 15653, United States of America, Plaintiff, vs. Sivear Willard Lindstrom, Defendant, as required by Praecipe of Defendant-Appellant, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of the United States District Court for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original Bill of Exceptions herein, as certified by the Judge of the said District Court, consisting of pages numbered 1 to 38, inclusive, and the original Assignment of Errors herein, consisting of three pages, are transmitted herewith.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred by me on behalf of the Defendant-Appellant herein in the preparation and certification of the said Transcript of the Record on Appeal to the United States Circuit Court [22] of Appeals for the Ninth Circuit, to-wit:

Appeal fee	\$5.00
Clerk's fee for preparing Transcript of Record on Appeal, 49 fol. at 15c and 8 fol. at 5c, and Clerk's certificate thereto..	4.15
	<hr/>
	\$9.15

and I do further certify that the said amount of \$9.15 has been paid in full to me by said Defendant-Appellant herein.

I do further certify that pursuant to Order of the District Court, the original exhibits admitted in the trial of this cause, numbered as follows, to-wit: Plaintiff's Exhibits, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, and Defendant's Exhibits, Nos. A-3, A-4, A-5, A-6, A-7, A-8 and A-11, are transmitted herewith.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, in the Western District of Washington, this 6th day of March, 1945.

[Seal]

MILLARD P. THOMAS,

Clerk

By By E. E. REDMAYNE,
Deputy

In the District Court of the United States,
Western District of Washington,
Southern Division.

No. 15653

UNITED STATES OF AMERICA,
Respondent,
vs.

SIVEAR WILLARD LINDSTROM,
Appellant.

DEFENDANT'S BILL OF EXCEPTIONS

Be It Remembered, that on the trial of this cause in this Court at the July term of 1944, the Honorable Charles H. Leavy presiding, the plaintiff, appearing by the Honorable J. Charles Dennis, represented in Court by Harry Sager, Esquire the duly appointed and acting Assistant United States Attorney in and for said district, and the defendant appearing in person and by his attorneys, Messrs. S. J. O'Brien and Ralph M. Rogers, commencing on December 5th, 1944, to-wit:

A jury was empanelled and sworn, according to law, to try the cause.

Mr. Sager, of counsel for plaintiff, thereupon made his opening statement to the Jury, and the defendant, through his counsel, S. J. O'Brien, made his opening statement.

Thereupon the plaintiff, to sustain the issues upon its part, offered testimony of witnesses and documentary evidence as follows:

JEAN SCHONBORN,

produced as a witness by the plaintiff, being first duly sworn, testified on

Direct Examination

I live in Puyallup and am employed by the Selective Service System in Puyallup as Clerk, for Pierce County Board No. 1. I have been Clerk of the Board since August, 1943, and I was Assistant Clerk since April, 1942. I know the defendant, [1] Mr. Lindstrom, and I have the file of his case with me. Plaintiff's Identification No. 1, is the registration card for Sivear Willard Lindstrom and is part of the official file and is the original card.

(Whereupon, plaintiff's Identification No. 1 was admitted in evidence.)

(Plaintiff's Identification No. 2, the Selective Service Questionnaire for the defendant was admitted in evidence.)

After Mr. Lindstrom's questionnaire was filed he was classified in 1-A by the local board on March 7th, 1941, and he was notified of said classification.

Mr. O'Brien: I want to make an objection to all of this line of testimony with reference to these matters that have gone before, if Your Honor please.

The Court: Objection overruled, exception allowed. He then asked that his case be sent to the appeal board. Plaintiff's Exhibit 4, is a notice of **classification** notifying Sivear Willard Lindstrom that he was classified in 1-A and it was mailed to him.

(Testimony of Jean Schonborn.)

(Whereupon, plaintiff's Exhibit 4 was admitted in evidence and read to the jury.)

The members of the board are Stanley Staatz, Mr. Ben L. Andre and Frank A. Porter. Mr. Staatz lives in Sumner, Mr. Andre at Fife, and Mr. Porter in Puyallup. Mr. Porter is a real estate and insurance agent and Mr. Ben L. Andre a retired merchant, and Mr. Staatz a bulb grower. They have been the board during all the time of its existence. Mr. Lindstrom appeared before the board to talk to them about his business operations, about his refrigeration service. He thought he should be in a deferred class and the board did not change his [2] classification. He then appealed, on the 18th day of April, 1941, and his file was sent to the appeal board. Plaintiff's Exhibit 3 is a letter of transmittal showing the letters were sent to the appeal board. The Questionnaire indicates that Mr. Lindstrom was not married. The board learned at a later time that he was married, on the 27th of March, 1941.

Mr. Sager: Will the Court rule on our offer of Exhibit 3?

The Court: Do you object to that, Mr. O'Brien?

Mr. O'Brien: No.

The Court: It will be admitted in evidence. I understand the defendant's position, for the purpose of the record, is that he objects to all of these various documents except those that deal directly with the order to report as of the time set forth in the indictment.

(Testimony of Jean Schonborn.)

Mr. O'Brien: Yes, we object to all this line of testimony as immaterial, and don't comply with the indictment.

The Court: The objection will be noted and overruled, exception allowed.

Counsel will be advised that the Court takes the position that we might expedite this matter, that all of these documents in the file from the date of registration down until the present time, are material insofar as they may bear upon the issue of being wilful and knowingly refusing to report.

(Whereupon, letter referred to was then received in evidence, marked Plaintiff's Exhibit No. 3, and read to the Jury.)

The next step in his classification, the registrant was ordered up for induction on June 17th, 1941. After that he was given a postponement of induction by the board so that they might investigate his case further. He had been in to see the [3] board in the meantime and his induction was postponed for thirty days. At the end of thirty days, he was given an additional thirty day postponement. The date of the second postponement was July 14, 1941. He then was classified 1-H, which meant he was a man over 28 years of age at that time. A change in regulations for those who were over 28, would be [3a] classified 1-H. That had not been the policy prior to that time. On February 20, 1942, he was classified in Class 3-A and his notice was mailed. He was notified of these various classifications and

(Testimony of Jean Schonborn.)

changes in each instance by card, similar to this Exhibit 4. 3-A classification is a married man. On October 9th, 1942, he was classified 3-B. That classification was for a married man who was working in a defense industry. He told us that he was working at the Seattle-Tacoma Shipyards. Subsequently we got a request for a deferment from the Shipyards. Plaintiff's Exhibit 5 shows that the request was made out on the 25th of June, 1943. Exhibit 5 is an affidavit of occupational classification requesting deferment of Sivear Willard Lindstrom. This affidavit is from the Seattle-Tacoma Shipyards. He was classified 2-B on June 28, 1943. That classification is for any man that is employed in a defense industry.

Mr. Sager: We offer Exhibit 5, Your Honor.

The Court: It will be admitted in evidence, subject to the previous ruling.

(Whereupon, document referred to was then received in evidence, and marked Plaintiff's Exhibit No. 5.)

The classification just referred to was given to the defendant for six months, ending December 28th, 1943. Identification No. 6 is a supplemental affidavit in support of a renewal replacement schedule from the Seattle-Tacoma Shipyards. It is a request for a further deferment for the defendant. We received that on December 3rd, 1943. It asked for a deferment ending April 28th, 1943. The defendant was classified on December 30th, 1943, in Class 2-B,

(Testimony of Jean Schonborn.)

ending April 28th, 1944.

(Whereupon, plaintiff's Identification No. 6 was received in evidence and marked plaintiff's Exhibit No. 6.) [4]

Mr. Lindstrom was notified of these deferment classifications by mail. After each classification, in each instance, a card was mailed him similar to Exhibit 4.

Plaintiff's Identification No. 7 is a letter from the Seattle-Tacoma Shipbuilding Corporation, dated January 17th, 1944, addressed to the draft board. The letter has some reference to the case of Mr. Lindstrom and is part of the draft files.

(Whereupon, letter referred to was then received in evidence, marked plaintiff's Exhibit No. 7, and read to the jury.)

Mr. O'Brien: Pardon me, our objection goes to all of this, also. I think it is highly immaterial.

The Court: I understand and I have ruled, Mr. O'Brien, and you have your exception.

On January 22, 1944, the defendant was classified 1-A and notice was mailed. He was ordered up for pre-induction physical examination on January 27th. Plaintiff's Identification No. 8 is the order to report for pre-induction physical examination sent to the defendant, Order No. 357.

(Whereupon, order to report for pre-induction physical examination was then received in evidence, marked Plaintiff's Exhibit No. 8, and was read to the jury.)

(Testimony of Jean Schonborn.)

PLAINTIFF'S EXHIBIT No. 8

Selective Service System

Order to Report

Preinduction Physical Examination

January 31, 1944

[Local Board Stamp illegible.]

The President of the United States,

To Sivear Willard Lindstrom. Order No. 357.

Greeting:

You are hereby directed to report for preinduction physical examination at No. 17 Tribune Building, Puyallup, Washington, at 7:00 a. m., on the 10th of February, 1944.

FRANK A. PORTER

Member or clerk of Local
Board

[Local Board Stamp illegible.]

IMPORTANT NOTICE TO REGISTRANT

Registrant who believes he has a disqualifying defect.—If you believe that you have some defect which will disqualify you for service you may, on or before the 8th day of February, 1944, appear in person at the office of the Local Board, or, if you are unable by reason of such defect to personally appear, you may submit an affidavit from a reputable physician or an official statement by an authorized representative of a Federal or State agency to

(Testimony of Jean Schonborn.)

the effect that such physician has personal professional knowledge or such authorized representative has official knowledge of your defect, the character thereof, and that you are unable to personally appear due to the character of the defect. The Local Board may send you to the Local Board examining physician, and, if it does so, it shall be your duty to appear at the time and place designated by the Local Board and to submit to such examination as the examining physician shall direct. If the Local Board determines that your defect does disqualify you for service you will receive a Notice of Classification (Form 57) advising you that you have been placed in Class IV-F. Unless prior to the date fixed for your preinduction physical examination, you receive such a Notice of Classification (Form 57) advising you that you have been placed in Class IV-F, you must report for your preinduction physical examination as directed.

Every registrant.—When you report for preinduction physical examination you will be forwarded to an induction station where you will be given a complete physical examination to determine whether you are physically fit for service. If you sign a Request for Immediate Induction (Form 219), and you are found qualified for service, you will be inducted immediately following the completion of your preinduction physical examination. Otherwise, upon completion of your preinduction physical examination, you will be returned to this Local Board. You

(Testimony of Jean Schonborn.)

will be furnished transportation and meals and lodgings when necessary. Following your preinduction physical examination you will receive a certificate issued by the commanding officer of the induction station showing your physical fitness for service or lack thereof.

If you fail to report for preinduction physical examination as directed, you will be delinquent and will be immediately ordered to report for induction into the armed forces. You will also be subject to fine and imprisonment under the provisions of section 11 of the Selective Training and Service Act of 1940, as amended.

If you are so far from your own Local Board that reporting in compliance with this order will be a hardship and you desire to report to the Local Board in the area in which you are now located, take this order and go immediately to that Local Board and make written request for transfer for preinduction physical examination.

The defendant was required to report to the draft board office at No. 14 Tribune Bldg. for the physical examination and he failed to report. After they report the draftees are sent, by bus, to the induction station. A few days before the defendant was to report he came in to talk to the local board for a hearing and they had a meeting at that time. His classification was not changed. The defendant requested that [5] his case be sent to the appeal board.

(Testimony of Jean Schonborn.)

The date of his appearance before the local board was February 7th, 1944.

Plaintiff's Identification No. 9 is a letter from our local board, written to the defendant. The original was mailed to him.

(Whereupon, letter referred to was then received in evidence, marked Plaintiff's Exhibit No. 9, and was read to the jury.)

The defendant gave notice of appeal and we ordered him up for another pre-induction physical examination, plaintiff's Identification No. 10 is an order to report for pre-induction physical examination, mailed by our board on February 28th, 1944, to the defendant.

(Whereupon, letter referred to was then received in evidence and marked Plaintiff's Exhibit No. 10.)

PLAINTIFF'S EXHIBIT No. 10

Selective Service System

Order to Report

Preinduction Physical Examination

February 28, 1944

[Local Board Stamp illegible.]

The President of the United States,

To Sivear Willard Lindstrom. Order No 357.

Greeting:

You are hereby directed to report for preinduc-

(Testimony of Jean Schonborn.)

tion physical examination at No. 17 Tribune Building, Puyallup, Washington, at 7:10 a. m., on the 7th of March, 1944.

FRANK A. PORTER

Member or clerk of Local
Board

IMPORTANT NOTICE TO REGISTRANT

Registrant who believes he has a disqualifying defect.—If you believe that you have some defect which will disqualify you for service you may, on or before the 4th day of March, 1944, appear in person at the office of the Local Board, or, if you are unable by reason of such defect to personally appear, you may submit an affidavit from a reputable physician or an official statement by an authorized representative of a Federal or State agency to the effect that such physician has personal professional knowledge or such authorized representative has official knowledge of your defect, the character thereof, and that you are unable to personally appear due to the character of the defect. The Local Board may send you to the Local Board examining physician, and, if it does so, it shall be your duty to appear at the time and place designated by the Local Board and to submit to such examination as the examining physician shall direct. If the local Board determines that your defect does disqualify you for service you will receive a Notice of Classification (Form 57) advising you that you have been

(Testimony of Jean Schonborn.)

placed in Class IV-F. Unless prior to the date fixed for your preinduction physical examination, you receive such a Notice of Classification (Form 57) advising you that you have been placed in Class IV-F, you must report for your preinduction physical examination as directed.

Every registrant.—When you report for preinduction physical examination you will be forwarded to an induction station where you will be given a complete physical examination to determine whether you are physically fit for service. If you sign a Request for Immediate Induction (Form 219), and you are found qualified for service, you will be inducted immediately following the completion of your preinduction physical examination. Otherwise, upon completion of your preinduction physical examination, you will be returned to this Local Board. You will be furnished transportation and meals and lodgings when necessary. Following your preinduction physical examination you will receive a certificate issued by the commanding officer of the induction station showing your physical fitness for service or lack thereof.

If you fail to report for preinduction physical examination as directed, you will be delinquent and will be immediately ordered to report for induction into the armed forces. You will also be subject to fine and imprisonment under the provisions of section 11 of the Selective Training and Service Act of 1940, as amended.

(Testimony of Jean Schonborn.)

If you are so far from your own Local Board that reporting in compliance with this order will be a hardship, and you desire to report to the Local Board in the area in which you are now located, take this order and go immediately to that Local Board and make written request for transfer for preinduction physical examination.

He did not report for the physical examination.

Identification No. 11 is a letter written February 29th, 1944, to Pierce County Local Board No. 1, signed by S. Willard Lindstrom, which was the notice of appeal.

(Whereupon, letter referred to was then received in evidence, and marked Plaintiff's Exhibit No. 11.)

The defendant did not report for his second physical examination during the morning that he was to report. He called by telephone and said that he would be unable to report and I told him to report as soon as he could, but he did not report thereafter. When the notice of appeal was filed we forwarded the entire file to the appeal board. Plaintiff's Identification No. 12 is the individual appeal record filed by our local board concerning the defendant, which is sent to the appeal board. [6]

(Whereupon, document referred to was then received in evidence and marked Plaintiff's Exhibit No. 12.)

(Testimony of Jean Schonborn.)

Attached to Exhibit No. 12 is a letter from the Washington State Headquarters to the State Occupational Adviser in Seattle, regarding the defendant. This was attached to the record when it came back to us.

(Whereupon, Exhibit No. 12 was read to the jury.)

The lower half of the sheet is the action of the appeal board and it is filled in by the appeal board.

A 3-D classification is a dependency classification. The defendant was notified of the action of the appeal board by one of the cards. Then he was sent an order to report for induction. Plaintiff's Identification No. 13 is a copy of the order to report for induction, dated April 26th, 1944, mailed by our local board to the defendant.

(Whereupon, order to report for induction was received in evidence, marked Plaintiff's Exhibit No. 13, and read to the jury.)

(Testimony of Jean Schonborn.)

PLAINTIFF EXHIBIT No. 13

[Stamped]: Local Board No. 1 97. Pierce County
053. April 26, 1944 001. Tribune Bldg., Puyallup,
Washington.

April 26, 1944.

ORDER TO REPORT FOR INDUCTION

The President of the United States,

To Sivear Willard Lindstrom.

Order No. 357

Greeting:

Having submitted yourself to a local board composed of your neighbors for the purpose of determining your availability for training and service in the land or naval forces of the United States, you are hereby notified that you have now been selected for training and service therein.

You will, therefore, report to the local board named above at No. 17 Tribune Bldg., Puyallup, Wash., at 7:00 a. m., on the 13th day of May, 1944.

This local board will furnish transportation to an induction station. You will there be examined, and, if accepted for training and service, you will then be inducted into the land or naval forces.

Persons reporting to the induction station in some instances may be rejected for physical or other reasons. It is well to keep this in mind in arranging your affairs, to prevent any undue hardship if you are rejected at the induction station. If you are

(Testimony of Jean Schonborn.)

employed, you should advise your employer of this notice and of the possibility that you may not be accepted at the induction station. Your employer can then be prepared to replace you if you are accepted, or to continue your employment if you are rejected.

Willful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and subjects the violator to fine and imprisonment.

If you are so far removed from your own local board that reporting in compliance with this order will be a serious hardship and you desire to report to a local board in the area of which you are now located, go immediately to that local board and make written request for transfer of your delivery for induction, taking this order with you.

S. W. STAATZ

Member or clerk of the local
board.

The defendant did not report on the day required.

Plaintiff's Identification No. 14 is a delinquent registrant report, mailed May 16th, 1944, from the local board to Honorable J. Charles Dennis, United States Attorney. That is the next step after a registrant fails to report.

Mr. Sager: We offer it in evidence.

(Testimony of Jean Schonborn.)

The Court: It will be admitted in evidence under the same conditions that refers to the other documents.

(Whereupon, delinquent registrant report referred to was received in evidence and was marked Plaintiff's Exhibit No. 14.)

Plaintiff's Identification #15 is a report of physical examination dated February 18th, 1941, for the defendant and is part of the official records.

(Whereupon report of physical examination referred to was then received in evidence and marked Plaintiff's Exhibit No. 15.)

Plaintiff's Identification No. 16 is a report of physical examination dated June 5th, 1941, for the defendant and is likewise part of the official file.

(Whereupon, report of physical examination referred to was then received in evidence and marked Plaintiff's Exhibit No. 16.)

(Whereupon, Plaintiff's Identification No. 15 was read to the jury by Mr. Sager, followed by the reading of Plaintiff's Exhibit No. 16.)

Cross Examination

By Mr. O'Brien:

These records of the draft board that have been put in evidence, are not all of the records in the case.

(Whereupon, the Court gave permission to the defense to examine the file as to the records.)

(Testimony of Jean Schonborn.)

When Mr. Lindstrom appealed to the appeal board, all the records pertaining to his case were sent to the appeal board. The records did not include X-rays of his wife as to her physical condition. They did include the affidavits of the family physicians as to the condition of Mrs. Lindstrom—also relative to the condition of Mrs. Lindstrom's father. When Mr. Lindstrom was notified to appear for physical examination in January, he had a hearing with the local board. Nothing was said at that hearing about the physical examination. They sent him a letter afterwards extending the period for thirty days. When the defendant came to the draft board in [8] February of 1944, there was no direct action and his classification was not changed. If he was classified different he wouldn't have to report for physical examination and the board told him that they would let him know later and then the welfare made a check as to the family situation and after that was done he was then notified again to report for physical examination. On the day he was to report for pre-induction physical he called up the draft board office and talked to me and told me that he would not be able to report because of the condition of his wife and I told him to report as soon as possible. It is not the practice of the draft board to have people come in any day for physical examinations, but they could come in and request it. I did not tell him that we would renotify him when to appear, but if he had come in we would have sent him to Seattle

(Testimony of Jean Schonborn.)

for examination. After the phone conversation, that is, a few days later, the defendant's file was sent to the appeal board in Seattle. That was on March 14th, 1944.

Redirect Examination

By Mr. Sager:

Plaintiff's Identification 11 is the notice of appeal that the defendant gave on this occasion, dated February 29th, 1944. That was before his physical was ordered. We have never seen any X-rays of Mrs. Lindstrom. All papers and documents in connection with this file were sent to the appeal board.

(Witness Excused)

MRS. JEAN DeLONG

produced as a witness on behalf of the Government, and after being first duly sworn was examined as follows: [8a]

Direct Examination

By Mr. Sager:

My name is Mrs. DeLong. I am Assistant Clerk for the draft board, since December 1st, 1943. I know the defendant, Mr. Lindstrom. About noon on April 27th, 1944, the defendant came to the draft board office with his wife and baby and his sister-in-law and two children. He had his classification card, which is plaintiff's Exhibit 17, and he told me

(Testimony of Mrs. Jean DeLong.)

that he would not report for induction and he tore up his classification card and threw it over the desk, at me. Plaintiff's Identification 17 is the classification card that we sent to him advising him of the decision of the appeal board, which was three to nothing, and we mailed it and that is the card he tore up. After he tore it up he threw it at the desk and at me and I picked it up and pasted it back together. At that time he said he would not report; that he did not consider that he was classified right; that he should have a different classification and that he would not abide by the rules until such classification was forthcoming. He said he wanted to take it to Court and at that time he would have all of his dependents, his lawyer, his doctor, the X-rays and anything pertaining to the case. He said there was a Court whereby he could get justice.

Cross Examination

By Mr. O'Brien:

His attitude was that he was not classified right, and that he just wasn't going to report.

(Whereupon, order to report for induction referred to was then received in evidence and marked Plaintiff's Exhibit No. 17.)

(Witness Excused) [9]

The Government Rests

MRS. S. W. LINDSTROM,

produced as a witness on behalf of the Defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. O'Brien:

My name is Mrs. S. W. Lindstrom. I am the wife of the defendant. We were married on the 27th day of March, 1941, in Tacoma. We have one child. She was born December 11th, 1943. My dad lives with me. He is crippled. He was in an accident where he worked and had his leg amputated. When my husband was notified to report for induction in May of 1944 I called Commander Chastek in Seattle twice. Commander Chastek is a member of the appeal board in Seattle. I called him from my neighbor's across the alley, Mrs. Gaidos. Her telephone number is Broadway 4409. I talked to Commander Chastek on the telephone on account of my dependency,—my dad's condition and mine. On May 1st I talked to him 18 minutes. He told me to go see the local board. I told him about my X-rays; that I couldn't take them at that time; that I was sick and I couldn't take the medicine. He said to go to the local board and re-appeal the case. I asked him whether we could re-appeal and he said, "Yes, you can certainly go there, take your X-rays and tell them to re-appeal the case," and they wouldn't do it. Then I called him again on May 10th. That afternoon when my husband went to work and I was sitting down with my dad listening to the radio

(Testimony of Mrs. S. W. Lindstrom.)
and someone over the radio made a statement that men over 26 did not have to report, I called Commander Chastek to see what he would advise me to do and Commander Chastek told me that he was going to [10] Camp Murray the next morning and he was going to the Shipyards and get my husband a deferment, which he did.

Mr. Sager: I object to that statement, Your Honor, what he did.

The Court: Yes, I will have to sustain the objection to the last phrase in her answer "which he did".

When my husband came home that evening I told him what had happened. Later I read in the Tacoma News Tribune, a newspaper, a statement relative to the drafting of men over twenty-nine. My husband will be thirty-three in March. That was the newspaper printed on May 12th, 1944. I also heard the same statement made over the radio prior to that time.

(Whereupon, the newspaper was offered in evidence and admission refused after the objection of the Government.)

Cross Examination

By Mr. Sager:

I called Commander Chastek on two occasions, May 1st and May 10th. On the first occasion I talked to him 18 minutes. I got the record from the telephone company. My husband did not ask me to call him. I called him myself because of my home

(Testimony of Mrs. S. W. Lindstrom.)

circumstances. My dad is a cripple. My husband did not ask me to call him on the second occasion. I just heard it over the radio. He wasn't there at the time I called Commander Chastek. He went to work about ten minutes to 3:00 and I called about fifteen after 3:00. When he got home he asked me if I found out and I said "Yes", and he said, "What did he say, do I or don't I?" And I said, "You don't, he is going to the Shipyards and get you a deferment" and we let it go. I don't recall talking to Major Armsted. The only [11] times I called I talked to Commander Chastek. My sister and I saw Major Armsted on one occasion in Seattle. I believe that was in March or April of this year. Commander Chastek never told me that the only place my husband could get a deferment would be from the draft board. He never told me that I should go to the draft board and straighten the matter out with them. He just told me he was going to the Shipyards and fix it all up and he said, "Don't worry a bit." That was on May 10th, 1944. On May 1st, when I called, he told me to go to the draft board and re-appeal my case. He didn't tell me to straighten it out with them. He told me to re-appeal my case. He didn't tell me the draft board was the only authority to fix classifications and he didn't tell me that he didn't have authorization to fix a deferment. All he said was he was going to the Shipyards and get the deferment for my husband and I didn't bother him any more and

(Testimony of Mrs. S. W. Lindstrom.)

we didn't hear from him or anything. I went to see Major Armsted about this classification too. He didn't tell me to go see the draft board. He said, "You must have evidently chewed the fat wrong", because, he said, "They should classify him differently", but we couldn't talk to the draft board. They wouldn't listen. We have been to the draft board about a dozen times since 1941 and we met with the board on a number of occasions and gone over this whole thing time and time again.

Redirect Examination

By Mr. O'Brien:

Mr. O'Brien asked me to go to the telephone company and receive a copy of the bill for the telephone call. This is the copy that I received from the telephone company.

(Whereupon, bill referred to was received in evidence and marked Defendant's Exhibit No. A-2) [12]

Recross Examination

By Mr. Sager:

My baby was born December 11th, 1943.

(Witness Excused)

SIVEAR WILLARD LINDSTROM,

the Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. O'Brien:

My name is Sivear Willard Lindstrom. I was born March 14th, 1912. I am thirty-two years old. I have had eight grades of grade school and about one-half year high school and I am a graduate of a correspondence course in Engineering. I used to be an automobile mechanic. I also took that up in school. I worked at that for some time. Then, I changed to refrigeration and home appliances. I am now a welder at the Shipyards. I have been there almost three years. In the time that I worked at the Shipyards I missed about two weeks work, when I had the flu, and other occasions when I was sick and I missed work in the neighborhood of two months when my wife was sick. I have never been arrested or convicted of a crime.

I received a notice of induction from the draft board about the first of May, 1944, stating that I was to report on the 13th of May, 1944. My wife called up the appeal board about that on the first of May. She told them she was unable to have X-rays taken of her gall bladder and they told us to re-appeal the case and put in our X-rays and the local board would appeal it to the appeal board and we did that. Then my wife called the appeal board the second time and she talked to Commander Chastek. She told me that he was going to get out a defer-

(Testimony of Sivear Willard Lindstrom.)

ment. He said, "We don't like to issue a 3-D classification, so we will put your husband on a deferment list and you will be [13] happy and I will be happy", and Commander Chastek says, "Tell your husband he don't have to report", "I will have that all straightened out." Thereafter I was called into the draft office at the shipyards. I went to the deferment department. They had me fill out a deferment on a piece of paper like I filled out before and I did not hear any more from it. The next time I received any communication in reference to my draft status was when I got a letter through the mail from the F.B.I., wondering where I lived. As near as I can remember, I wrote on the back of the same paper and sent my address back to them. I don't recall when that was. Later, I received a letter from the F.B.I. and after receiving this letter I went to the United States Attorney and talked to him. He told me to go and see the draft board, which I did. After quite a conversation with them they told me that they didn't care about my wife, as far as they were concerned I was in the Army.

(Whereupon, letter referred to was received in evidence and marked Defendant's Exhibit A-4.)

(Testimony of Sivear Willard Lindstrom.)

DEFENDANT'S EXHIBIT A-4

Federal Bureau of Investigation
United States Department of Justice

25-8641

407 U. S. Court House

Seattle 4, Washington

July 29, 1944

Mr. Sivear Willard Lindstrom

2801 Portland Avenue

Tacoma, Washington

Dear Sir:

The United States Attorney has informed this office that you have been reported delinquent by Selective Service Board #1, Puyallup, Washington.

You are instructed to immediately communicate with this local board and to comply with any orders received without further delay. The enclosed self-addressed envelope may be used to advise me you have contacted your Local Board.

This Matter Demands Prompt Attention, Inasmuch As Failure To Obey Instructions Of Your Local Board May Subject You To Prosecution In The United States District Court.

Very truly yours,

L. V. BOARDMAN

Leland V. Boardman

Special agent in charge

Enclosure

(Testimony of Sivear Willard Lindstrom.)

That was sometime in August of 1944. Then I went to see Mr. Rogers. He said he would try and straighten it out.

Mr. Sager: I object.

The Court: No, I will have to sustain the objection. I do not see how the fact that he went to see counsel—assume now that if counsel told him he didn't have to obey the rules and regulations in the Act, and I couldn't hardly assume that, but under the circumstances, whatever he told, whether he told him to obey it or disobey, still it would not exonerate him from failure to comply with an order, and would not bear upon the issue of good faith to the degree—and would be self-serving if he went to see his own counsel. I will have to sustain the [14] objection, Mr. O'Brien.

Mr. O'Brien: Well, we want to make an offer of proof; Your Honor please.

The Court: Well, when we have the intermission you can make the offer of proof.

I do not have any objection to going into the Army. I am willing to go when my turn comes.

The only reason I went to the draft board on these various occasions was because of the fact that I felt I was improperly classified and I wanted them to recognize my family conditions. I was not under the impression that I was to report on May 13th because of the messages that were given to me by my wife and also by the statement in the newspaper. I have been in the Shipyards ever since the 13th of May, 1944.

(Testimony of Sivear Willard Lindstrom.)

Q. Did you receive a deferment from the Shipyards?

Mr. Sager: I object to that; the shipyards do not grant any deferments.

Mr. O'Brien: Well, from the draft office.

Mr. Sager: There isn't any draft board at the Shipyards.

The Court: I will have to sustain your objection unless you want to direct it to the draft board, and you have.

Q. Well, were you under the impression then, that this office you went to in the office in the shipyards could grant you a deferment?

A. Yes. It was my belief that Commander Chastek was above the draft board at Puyallup or he wouldn't be on that appeal board. If I had known that the draft board in Puyallup was the one that I had to obey, I would have reported for induction. I am willing to go to the Army any time they want me. The only objection I had was the fact that I was improperly [15] classified and I did not believe I was to report on account of these communications.

Cross Examination

By Mr. Sager:

I was willing to go into the army whenever my turn came, but my turn did not come in January of 1941. I may have been classified 1-A in the early part of 1941, I am not sure. I don't know whether I was classified 1-A in March, 1941. It seems to me

(Testimony of Sivear Willard Lindstrom.)

I was married before I ever received my classification. I did not call up the draft board to tell them I was married before I had been married. I always told them the truth. I was married on March 27th, 1941. I received a copy of plaintiff's Exhibit No. 4, which put me in Class 1-A, but I don't know about the date. It is dated March 7th, 1941 and I was married on March 27th. I appealed my 1-A classification after we had a hearing with the board.

Mr. O'Brien: I still object, if Your Honor please, to this line of testimony on cross-examination.

The Court: Objection will be overruled, exception allowed.

Mr. Rogers: If the Court please, I would just like to say that this man is not being tried here for trying to have his classification changed back in 1941. He is charged very specifically under this indictment from May 13th of this year. Now, it may be true that a certain amount of the background of showing the history of his classification might be necessary, but what is happening here, if the Court please, is counsel is trying to bring out a lot of evidence to throw some light into the man's prejudice for his probably having tried to have his classification changed three years ago, which I think any man had a right to do if he was justified. The law provides for it. [16]

The Court: The question goes very properly to the issue of good faith in the matter of knowing that he was not complying with an order. That is the only defense that is raised here. There is no issue

(Testimony of Sivear Willard Lindstrom.)

raised here that there wasn't an order made; that there wasn't a classification made. Now, then, if he had been registered and dealt with his draft board for three or four years, it would be a question very material as to whether or not he innocently failed to comply with an order, or whether he had knowledge of the situation over a long period of time. That is an issue that the jury must pass upon, not the question as to whether the board properly classified him or not, and he has taken the stand and proposed a defense he believed he did not have to report. That is what makes this all competent.

Mr. O'Brien: If your Honor goes into the matter about the appeal, we ought to be able to show why he did not——

The Court: No, it is not a question as to why he appealed or why the board put him where they did, but the fact is that they did put him there and he was ordered to report on a given day, and that he says now he did not report, but he thought he didn't have to.

Mr. O'Brien: We do not deny but what he was classified 1-A and did not report when he should report.

The Court: That becomes a complete offense, and there is no appeal from his classification as made by the draft officials to the Court, excepting habeas corpus proceeding, not in a case of this kind, but the defense can always be interposed that he did not know, and that is the defense that I understand you have interposed here.

(Testimony of Sivear Willard Lindstrom.)

Mr. Rogers: I understand that, but I still cannot see [17] where it makes any difference, as far as that is concerned, whether he was classified A-1 before his marriage or after his marriage. I don't see how that has a bit of relation, whether he is in good faith now. It is simply a matter of record.

The Court: It goes to the question as to whether he regarded or disregarded the orders of the draft board under whose jurisdiction he was for a period of three and a half years.

The Court has ruled, and I will allow you an exception, and of course I admonish counsel for the Government we are going to spend a great deal of time on all of those various steps.

Mr. Sager: I do not intend to go through all of that, Your Honor. My examination here was directed to the statement that he was perfectly willing to go in when his order came up. His order came up back in January, 1941.

The Court: Now, let's proceed.

I received a letter from the F.B.I., which is Defendant's Exhibit A-4, on July 29th, 1944, I believe I received it two or three days later. I have read the letter.

Q. It says the United States Attorney has informed this office that you have been reported delinquent by Selective Service Board No. 1 in Puyallup, Washington. You are instructed to immediately communicate with this local board and to comply with any orders received without further delay. Enclosed self-addressed envelope may be used to

(Testimony of Sivear Willard Lindstrom.)

advise us you have contacted your local board. This matter demands prompt attention inasmuch as failure to obey instructions of your local board may subject you to prosecution in the United States District Court.

Did you read that, did you? [18]

A. Yes.

Q. Did you think, after reading that, you were still entitled to disobey the order to report for induction?

A. I acted on that order, but of course my induction period had expired then.

Q. You were required to report on May 13th?
[18]

A. Yes.

Q. And of course you did not?

A. I was told not to, so of course I didn't. My wife told me not to.

After I got the letter from the F.B.I. I went to see you here in this building and my wife was with me and I had this letter with me. You told me that I would have to straighten this out with the draft board and comply with their orders and that is what I tried to do. You also told me that if they ordered me to report that I would have to report, but they did not order me to report. The order to report that I had, the time had already gone by. As far as I know I was on a deferment. You told me that regardless of what I thought my classification ought to be, I should have complied with that order. I thought that Commander Chastek was higher than

(Testimony of Sivear Willard Lindstrom.)

you. I didn't talk with Commander Chastek—my wife did, and it was after she talked to Commander Chastek that we came in to see you and you told me that I would either have to get this thing straightened out with the local board or there would be a prosecution. I saw the local board and then I handed that letter to Mr. Rogers. I had a long meeting with the board in July of this year and they told me that I had not reported for induction pursuant to their order. My wife was not with me at this meeting. I was up there alone. They locked the doors so that none of my dependents could come in. I had a long talk with the draft board. I was not demanding a re-classification, I told them I would go when my turn came. I told them I expected consideration in the case. I told them if my case warranted a re-classification I expected it. I didn't tell them that until I was re-classified I would not report for [19] induction. I did not offer to report at that time and they didn't tell me to report. I told them that I was on deferment at that time. I saw the deferment in their papers. I did not get any re-classification or any further deferment after I was ordered to report for induction, but I applied for a deferment to the Shipyards. I don't know whether or not it was ever allowed by the board. I never got any notice as to whether it was or was not, but Commander Chastek said I should have one. I was ordered to report for physical examination on March 7th, 1944. That is the time I called up the draft board and said I couldn't appear on that day

(Testimony of Sivear Willard Lindstrom.)

because of my wife's condition. I sent a telegram to the President in connection with this matter.

Q. I will show you Plaintiff's Exhibit 18 and ask you if that is the telegram you sent to the President?

A. I suppose. That is not the way I worded it. The Court: Speak up a little louder.

A. That is something like it, I can't remember putting in this statement.

Q. Well, you do recall sending a wire or telegram to the President on March 7th, 1944?

A. I recall sending a telegram.

Mr. Sager: We offer that in evidence.

Mr. O'Brien: We object, it is not properly identified, if Your Honor please.

The Court: Objection will be sustained, as not properly identified, Mr. Sager.

Mr. Sager: I think it is properly identified. It shows on its own face, Your Honor——

The Court: It is a copy. You submitted it to the witness [20] and asked if that was his telegram. He said yes, but there is substance in that telegram he has no recollection of having written or sent, so your——

Mr. Sager: That is the original telegram, that is not a copy. This is the telegram that went to the White House. It has the White House stamp on it.

Mr. O'Brien: That is not the one he sent, he said.

The Court: Your identification does not even meet the elementary rules of evidence. The fact

(Testimony of Sivear Willard Lindstrom.)

there is a typewritten signature on a typewritten telegram, you have to have some identification on it.

Mr. Sager: He says he sent a telegram on this date.

The Court: If you desire to further identify it, if you have some one here that received the telegram or accepted the money from him and can verify it as the telegram he sent, or an explanation of the part of the telegram he challenged—I don't know what it is, but anyway, he questioned a portion of it.

Q. Do you recall sending a telegram to the President on that date, don't you, Mr. Lindstrom?

A. I recall sending a telegram, but not on that date.

Q. Wasn't that the same date that you were to report for this physical examination?

A. I don't know. I never tried to keep tract of it.

Q. Well, didn't you testify to that fact just a little while ago? A. What?

Q. Didn't you say that was a fact a little while ago, that you sent this telegram on that date? [21]

A. I said that I knew of sending a telegram, and I didn't know the date, and I wasn't sure of the wording of it.

Q. From what office did you send the telegram to the President?

A. I believe this here was from the Tacoma office.

(Testimony of Sivear Willard Lindstrom.)

Q. The Western Union here in Tacoma?

A. Yes.

I never talked to Commander Chastek, but I know that he is on the appeal board in Seattle and I am not mistaken about that. I don't recall talking to Major Armsted. I talked to somebody at the board, but I don't know the name I am sure.

The Court: Now, you may go ahead and make your offer. Mr. Sager, you had better pay attention to this.

Mr. O'Brien: We offer to prove that the defendant, Sivear Willard Lindstrom, in response to the letter which has been introduced as Defendant's Exhibit A-4, went to see his attorney Ralph M. Rogers; that Ralph M. Rogers, acting as his attorney, wrote a letter on August 3rd, 1944, to Mr. Leland V. Boardman, Special Agent in charge, Federal Bureau of Investigation, United States Department of Justice, and sent copies of the letter to the local board Number 1, Puyallup, Washington, and to DeLong, the State head of the Selective Service, Commander Chastek, Major Armsted, answering this letter which is Defendant's Exhibit A-4, stating the facts in reference to Mr. Lindstrom's draft status, that he received a letter from L. V. Boardman, Special Agent in charge, dated August 11th, 1944, in reply thereto, in which he said:

"This office has made an additional copy of your letter available to the United States Attorney at Tacoma. The local board, of course, must de-

(Testimony of Sivear Willard Lindstrom.)

termine the proper classification of [22] the registrant. This board, however, has been requested to fully notify the United States Attorney at Tacoma regarding the circumstances considered in reaching the 1-A classification in this case. Further action to be taken by this bureau will thereafter be ascertained from the United States Attorney.' Signed by Mr. Boardman.

Mr. Rogers informed Mr. Lindstrom that the matter was in the hands of the United States Attorney; that he would let him know when something comes up with reference to it. That is where the matter stood at the time of his arrest.

We claim——

The Court: Well, that might remotely bear on this issue of knowingly refusing to report, but you have the situation that subsequent to the time that these various officials of the United States Government—some of them, perhaps, who might even have assumed authority they did not have, were giving advice and so forth; that the grand jury had not indicted, and up until the date of indictment—this in the absence of the jury, and I say it very frankly to you, it would have been the duty of this defendant, if he was laboring under a misapprehension on the 14th of July because of what his wife told him, and Commander Chastek told him, or even what the United States Attorney told him, he still had, up to the date of the return of the indictment, to go and offer himself in compliance

(Testimony of Sivear Willard Lindstrom.)

with the order, and there is no showing that he ever did that.

Mr. O'Brien: That will be taken up later on in one of these reports here. The local draft board, on July—which will go in, he says—this is their own records, he says, “I am not refusing to go in the army.”

Mr. Sager: Read the rest of it. [23]

The Court: The fact is, he is not in the army and the fact that he is ordered in and even to this late date, even upon an arraignment in this court—

Mr. O'Brien: You are not dealing with people of high intelligence. This situation is that this fellow is so darned confused he doesn't know where he is.

The Court: There are many, many people,—thousands of them in the army who, perhaps, have less education and less intellect than this man, and it is a question of fact for the jury and not for the Court as to whether he knowingly declined upon that day or any day subsequent and up to——

Mr. O'Brien (Interrupting): This is afterwards, and we are attempting to show that afterwards he went to his lawyer and he told him he would let him know. This letter certainly calls for a hearing with somebody with reference to this matter.

The Court: These letters of communication indicate to me that officials perhaps in a desire to be courteous, have done a lot of things that they just as well might not have done. The question for me

(Testimony of Sivear Willard Lindstrom.)

to consider is whether or not he could have been misled, and if there is any showing at all that he could have been misled, I am sure Mr. Rogers would not have ever intentionally advised him to violate the law, but Mr. Rogers may not be too well posted on the draft law and regulations.

Mr. Rogers: The question before the Court is whether or not this evidence should go to the jury. The jury is the one that has to determine the facts in this case, and it seems to me that while it may be true that officers, high officials, in an effort to be courteous are doing things they should not, but certainly if they do those things and they led the less wise to do acts—— [24]

The Court: I will examine the letters during the intermission, if you will pass them up.

Mr. Rogers: It simply goes to the question of good faith or bad faith.

The Court: The situation would not change the major consideration here, assuming that the jury should find as a fact, it was through ignorance and no intention to violate the law at all that he failed to report any time up to the time of his indictment, and therefore acquit him, he is immediately confronted with the proposition of complying with the draft board order.

Mr. O'Brien: He has already been so advised by me. We know that, but he has got to get out of this first.

The Court: I don't know, but from what the United States Attorney says, there is no intention

(Testimony of Sivear Willard Lindstrom.)

that he has ever submitted to the United States Attorney, even since the indictment, that he——

Mr. O'Brien (Interrupting): We realize he has got to go right back into the arms of the draft board. We certainly have to dispose of this first, there is no question about that in my mind.

The Court: I shall examine these documents in the intermission.

(Recess.)

(Whereupon, jury resume their seats.)

The Court: Now, in the matter of the letters that have been submitted for the Court's ruling and on the offer of proof made in the absence of the jury, I shall deny the offer of proof, except insofar as it deals with the letter from the Special Agent in charge, if the defendant himself says that he [25] saw the letter. But, the letter written by Mr. Rogers detailing the history of the case and the basis upon which deferment was asked, would not be competent.

Mr. O'Brien: What about the advice that he was given by Mr. Rogers with reference to the letter?

The Court: I do not know that your offer of proof went to it.

Mr. O'Brien: He advised him he would let him know when he heard from the United States Attorney.

The Court: Mr. Rogers' status as an attorney is that of a representative of the defendant. That could never become an excuse for violation of the

(Testimony of Sivear Willard Lindstrom.)

law, but that letter, if you can make a showing that it was brought to the attention of the defendant, the defendant is still on the stand, is he not, or did you finish? Have you finished your cross-examination?

Mr. Sager: No, I had not quite finished, Your Honor.

Cross Examination—(Resumed)

By Mr. Sager:

In May I went to Seattle and talked to somebody at the appeal board. I wouldn't say it was Major Armsted. I am not sure. I don't recall whether I was told that I would have to get this matter straightened out with the local board; that they were the only ones that could give me a deferment. The man talking to me was somewhat evasive as to what I was to do. I don't remember him telling me that the local board was the only one that could give me a deferment. I went up to the appeal board to see somebody with regard to this matter because I realized the appeal board was above the local board. I might have talked to Major Armsted. I don't believe I was [26] discussing this matter with him after I had been ordered to report and had failed to do so. I believe I was there before I was to appear for induction. I didn't discuss anything with any of them after May 13th, except the local board and you. I remember going to Seattle and talking about a classification. I wanted to re-appeal. I don't remember for sure if it was Major Armsted. It was somebody up there. I believe it might have been him. I don't remember any particular thing

(Testimony of Sivear Willard Lindstrom.)

I said in the telegram to the President. I know I told the president that my wife was sick and all that. I do not remember telling him that I didn't report for pre-physical induction because that would be a lie. I would gladly report as I told you if my turn came. I didn't say in the telegram that I was not going to report on my pre-induction physical, or that I considered it a trick of the board.

Redirect Examination

By Mr. O'Brien:

After I received the letter from the F.B.I., which was dated the 29th of July, 1944, I went to see Mr. Rogers and he wrote a letter for me and he received a letter in reply from the F.B.I.

(Whereupon, letter referred to was then received in evidence, was read to the jury and marked Defendant's Exhibit A-5.)

DEFENDANT'S EXHIBIT A-5

Federal Bureau of Investigation
United States Department of Justice
407 United States Court House
Seattle 4, Washington
August 11, 1944

Mr. Ralph M. Rogers, Attorney
1205 Rust Building
Tacoma, Washington

Re: Sivear Willard Lindstrom

Dear Sir:

I have your letter dated August 3, 1944, concern-

(Testimony of Sivear Willard Lindstrom.)
ing Sivear Willard Lindstrom, registrant of Pierce County Local Selective Service Board No. 1, Puyallup, Washington, and I wish to thank you for the comprehensive statement made therein of the circumstances which you believe may justify a deferment by the Local Selective Service Board.

It is noted that a copy of your letter was directed to the Local Board at Puyallup, as well as to the State Director and to Commander C. Chastek. This office has made an additional copy of your letter available to the U. S. Attorney at Tacoma. The Local Board, of course, must determine the proper classification of the registrant. This Board, however, has been requested to fully notify the U. S. Attorney at Tacoma regarding the circumstances considered in reaching the 1-A classification in this case. Further action to be taken by this Bureau will thereafter be ascertained from the U. S. Attorney.

Very truly yours,

L. V. BOARDMAN

Leland V. Boardman

Special Agent in Charge

Defendant's Exhibit A-5 is the answer Mr. Rogers received from the F.B.I.

After I received the letter of July 29th, from the F.B.I., I took the letter over to Mr. Rogers and he said he would write a few letters and probably

(Testimony of Sivear Willard Lindstrom.)

straighten it out. Later on I dropped down and saw this letter that he had received. I had no more contact with anyone in connection with this case until [27] the time I was arrested on this charge. After that time I went to the local board on July 31st, 1944. They said they would recognize the deferment if I would see Commander Chastek and he would recognize it. I asked them if they had my deferment there and they finally said, "Well, it is here," and they showed me the deferment.

Recross Examination

By Mr. Sager:

On July 31st, when I went out to the draft board, they did not tell me that they had classified me properly; that the appeal board had affirmed the classification, or that I had failed to report for induction, and that they were not going to do anything further about it. They said, "We don't care about you, and we don't care about your wife, so as far as we are concerned, you are in the army." They did not tell me that I was delinquent, and that they were not going to change my classification. They said they had the deferment there, but they did not want to recognize it because they didn't like it. They said they received the notice of deferment, but they did not want to recognize it. It may have been a request, or a deferment, I don't know which, but they told me they would not allow it.

(Testimony of Sivear Willard Lindstrom.)

Redirect Examination

By Mr. O'Brien:

They did not tell me to report for induction on any specific day when I was there. They told me to see Commander Chastek or some higher authority, but they said if Commander Chastek recognized the deferment they would. That is what they told me to do on July 31st.

(Witness excused.) [28]

EARL D. MANN,

produced as a witness on behalf of the defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Rogers:

My name is Earl D. Mann. I am Deputy Prosecuting Attorney of Pierce County. In June of 1944 I was Assistant Deferment Supervisor at Todd Pacific Shipyards and the records were made under my supervision. I don't know Mr. Lindstrom personally. I know who he is.

In January of 1944, Mr. Lindstrom had a deferment which ran to the 28th of April, 1944. In January of 1944, it became necessary to get extension deferments for welders, and in order to do that we worked out an agreement with the State Selective Service headquarters that if on the defer-

(Testimony of Earl D. Mann.)

ments that would run for a longer period, if we would agree to advance the expiration of these longer term deferments, they would extend the terms of these welders for which we were asking an extension, and we agreed to that and went through our records selecting all men whose deferments expired in February, March and April of that year for advancement of their deferments, and among those was Mr. Lindstrom, whose deferment was then advanced to expire immediately. That notification to the Selective Service Board was as of January 17th. Then, right after that we got notice of the cancellation of his deferment. Next we have the notice of January 28th cancelling Mr. Lindstrom's deferment and placing him in 1-A in accordance with our agreement. On March 8th we received a request from the Selective Service Board in Puyallup for Mr. Lindstrom's work record. We answered that by giving them a statement of his absences. On June 5th, in conformity with a revision of the Selective Service regulations, [29] we were permitted to again place men over thirty on our replacement schedules, and again asked for a deferment, even though they had previously been scheduled for release. On June 5th, we placed the name of Mr. Lindstrom on our replacement schedule, authorizing us to ask for his deferment **again**, and we submitted a request for his deferment at that time. We asked Mr. Lindstrom, on June 3rd, to come to our office. I have a record showing that we requested him to do this. We sent these re-

(Testimony of Earl D. Mann.)

quests for deferment to the Selective Service Board where the registrant is registered. We submit our replacement schedule listing to Commander Chastek, Occupational Advisor, for approval before submitting the deferments to the draft board. In this particular case the request for deferment was sent to the board on June 5th, which was the date the man's name was placed on the schedule. However, the sheet was not complete at that time, and was not sent in for approval by the State office until June 13th. At that time we requested a deferment for more than six months, which means more than six months from April 28th, 1944. On June 13th the replacement list was sent to Commander Chastek and was returned to us on July 4th, 1944, with their approval. Mr. Lindstrom's name is on that list.

Defendant's Exhibit A-6 is page 192 of the supplement of our second renewal replacement schedule that was effective April 28th, 1944. That is one of the four sheets that were sent for approval and this list contains the name of the defendant.

(Whereupon, list referred to was then received in evidence and marked Defendant's Exhibit No. A-6.)

Defendant's Exhibit A-7 is a letter from Commander Chester [30] J. Chastek on July 4th, 1944, approving the replacement schedule of which sheet 192 is included, which is defendant's Exhibit A-6.

(Whereupon, letter 192 referred to was then received in evidence and marked Defendant's Exhibit A-7.)

(Testimony of Earl D. Mann.)

We have not received any communications since this letter relative to Mr. Lindstrom, from either the State Selective Service Department or his local draft board.

There was another request for a deferment made on the 28th of September, 1944. The six months' period would have expired on October 28th, 1944.

Q. I see, as far as your records show, Mr. Mann, this Mr. Lindstrom would still be on deferment there in the same category as the other men on deferment? A. Now, how is that?

Q. As far as your records show there, he is in the same position now as other men on that list?

A. Not quite, no. The last communication from the board regarding deferment was his 1-A classification in January.

Mr. Rogers: I see, that is all——

Q. Well, he is still on deferment as far as your records show, though?

A. We are authorized to request this deferment.

Q. I see.

A. Which we did.

Cross Examination

By Mr. Sager:

The only one that has any authority to grant a deferment is the draft board. The draft board notifies us of the deferment by sending us a card indicating the classification, [31] designating that deferment, and if it is for a limited period, the card shows when the deferment expires. The fact that

(Testimony of Earl D. Mann.)

we request a deferment does not mean that he is deferred or entitled to deferment. The fact that Commander Chastek approved the replacement list does not indicate the defendant is entitled to a deferment. That is just Commander Chastek's approval insofar as the War Manpower Department is concerned. I don't believe Mr. Lindstrom came into the office to inquire about his deferment in this case. We usually make a note on the record if the man does inquire as to his deferment.

Q. The fact is, he was not given a deferment?

A. As far as I know he was not.

Q. It is not shown on the record he was?

A. No.

Q. Your record shows his last classification was 1-A, and you received notice of that some time in January, shortly after this release that you sent to the board?

A. Yes.

JEAN SCHONBORN,

recalled for further cross examination, was examined and testified as follows: [31a]

Cross Examination

By Mr. O'Brien:

We usually have an assistant clerk who makes the records of the hearings before the local draft board. They are typewritten. Defendant's Exhibit A-8 is a record of the hearing of Sivear Willard Lindstrom, dated July 31st, 1944. Exhibit

(Testimony of Jean Schonborn.)

A-9 is a letter from Leland V. Boardman, Special Agent in charge of the Federal Bureau of Investigation, written to Pierce County Local Board No. 1, dated August 11th, 1944. This letter is in reference to Mr. Lindstrom. Defendant's Exhibit A-10 is a letter from Commander Chester J. Chastek, State Occupational Advisor, dated August 15th, 1944, regarding the defendant.

(Whereupon, Exhibit A-8 was received in evidence.)

Defendant's Exhibit A-11 is an occupational certification from Earl D. Mann of the Todd Pacific Shipyards, Inc. We received it October 2nd, 1944, regarding the defendant. It is a request for a deferment; the occupational certification showing that he is employed by the Shipyards.

(Whereupon, Occupational Certification referred to was then received in evidence, marked Defendant's Exhibit A-11.)

Redirect Examination

By Mr. Sager:

Q. Showing you Plaintiff's Exhibit 18 for identification, Miss Schonborn, is that part of your draft board file in this case? A. Yes, it is.

Q. And how did you receive it?

A. We received it through our state headquarters.

Q. It is a part of your official file? [32]

A. Yes, it is.

Mr. Sager: We offer that in evidence.

(Testimony of Jean Schonborn.)

Mr. O'Brien: We object, if Your Honor please. It still does not show anything being written by the defendant. Not properly identified at all.

The Court: It is relevant to the issue here, good or bad faith. It is part of the official files.

Mr. O'Brien: But there is nothing here to show that the defendant wrote this. He says he don't remember writing it.

The Court: The defendant, upon direct or cross-examination, admitted that he sent a telegram about that time, but he does not recall and denies a portion of the contents of this particular telegram. Of course there would be another way to make proof by a subpoena duces tecum of the telegraph company, but it is a part of an official draft file. The case involves a draft case, and I shall rule that it is admissible and allow you an exception.

Mr. O'Brien: We object to it on the ground it is incompetent, immaterial and irrelevant, and not the best evidence.

Mr. Rogers: Particularly on the ground, if the Court please, it is not properly identified. This instrument can only be introduced to prove the fact which it states, and Mr. Lindstrom on the stand made the statement he does not remember making the statements.

The Court: Mr. Rogers, this case is considerably different from the ordinary criminal action. This case rests itself largely upon documentary proof as found in the draft files. The draft files are all official, and [33] if material is found in them

(Testimony of Jean Schonborn.)

to the issues that have been raised and is competent, it can be denied by the defendant, and the Court will permit you to recall him for that purpose.

Mr. O'Brien: He denied it already.

The Court: He admitted he sent a telegram, but denied a portion of it. It will be admitted and exception allowed.

(Whereupon, telegram referred to was received in evidence and marked Plaintiff's Exhibit No. 18.)

PLAINTIFF'S EXHIBIT No. 18

[Stamped]: White House, Washington, Mar. 7, 4:31 P.M., 1944.

WB24 NL Tacoma Wash Mar 7 1944

Honorable Franklin D. Roosevelt
White House

Wife always sick under doctors care can not work has nervous break down about to have another needs two major operations has 4th grade education doctors orders her to stay in bed if help can be had one child 3 months old supporting crippled father owe \$2000 in bills and mortgage government allowance entirely inadequate welder in shipyard 32 years old Pierce County Board 1 Puallup will not consider disregarded 3 doctors affidavits have filed for appeal but draft board dishonest appeal board once made them give us a 3A on account of not presenting doctors affidavit to them will not appear for pre induction as we consider it a trick of the board this board has far from

(Testimony of Jean Schonborn.)

taken its non dependency cases my wifes condition is such that she will never be able to support herself we know that these cases are taken into consideration please reclassify quickly as wifes nerves are at breaking point thanking you kindly

S. W. Lindstrom 2801 Portland Ave Tacoma Wash.

Mr. Sager: I would like to read it at this time, Your Honor.

The Court: Then, will that be all you have of this witness.

Mr. Sager: I think it is.

The Court: Very well.

(Whereupon, Plaintiff's Exhibit No. 18 was read to the jury.)

The Court: Anything further?

CHESTER J. CHASTEK,

produced as a witness on behalf of the Government, after being first duly sworn was examined and testified in rebuttal as follows:

My name is Chester J. Chastek. I am a Commander in the United States Navy. I am the Navy Liaison Officer to the State Director of Selective Service and assigned by him as a member of his staff to the billet of State Occupational Advisor.

(Testimony of Chester J. Chastek.)

My duties are to counsel with industry, the Selective Service boards and the appeal boards on manpower problems. I have been doing this for approximately three years. I am part of the Selective Service, but I am not a member of the appeal board. I had a telephone conversation with Mrs. Lindstrom on May 10th, 1944. I have the record of it in my log. [34] Mrs. Lindstrom was quite excited about the Selective Service status of her husband. She talked at great length about a background of human misery, and woe in the family, her own physical condition, his essentiality to the shipyards, by which he was employed. Her object in calling me was to secure assistance in attempting to get deferment for the defendant. I promised her to look into the matter, but counseled her to keep in touch with her local board. I did not tell her that I would get a deferment. I have no authority whatsoever to grant any deferment. The only one who has that authority is the local board and I so advised her.

Mr. Lindstrom called me on the 31st of July at 2:07 P.M. I recall distinctly that I asked him to get in touch with his local board. I told him that I had learned from the local board that he had not done certain things required of him, such as responding to requests of the local board with regard to physical examination. I advised him to contact his local board and satisfy them. He called to see me in an attempt to secure a deferment. I told him he would have to contact his local board for such deferment. I did not tell him I would get a defer-

(Testimony of Chester J. Chastek.)

ment for him. This conversation was on July 31st, 1944.

Cross Examination

By Mr. O'Brien:

I keep notes in reference to telephone calls and my notes do not show that in my phone conversation with Mr. Lindstrom on the 31st of July that he asked me about getting a deferment. It could be possible that he told me he was on deferment. I have a general sense of the conversation and as a general rule when these registrants call I give them practically all the same advice. [35]

FRANK ROBERT ARMSTED,

produced as a witness on behalf of the Government, after being first duly sworn was examined and testified in rebuttal as follows:

Cross Examination

By Mr. Sager:

My name is Frank Robert Armsted. I am a Major in the United States Marine Corps. I am a Marine Corps Liaison Officer with the State Selective Service headquarters in the State of Washington, assigned by the Director of Washington as Assistant Occupational Advisor and have been such for about two years. I am not a member of any appeal board. I am assigned to Selective Service for duty.

Plaintiff's Exhibit 12 has the stamp of appeal

(Testimony of Frank Robert Armsted.)

board No. 3 of Seattle. It is all one board, with three panels. The three indicates it is from Judge Jones' panel. Each panel contains five members. I am not an appeal board member. I review the appeal records before they go to the appeal panel, but I make no recommendation or comment on the regulations governing the case. I reviewed the Lindstrom case in the early part of April, when it was in the process of appeal. I saw the defendant in the latter part of May of this year. He came to the office in Seattle. His wife and another woman were with him and two small children about 4 or 5 years old. He came in and asked for Commander Chastek and Commander Chastek was not in and so I took care of the case. He said he was not classified properly and I asked him what his classification was and he said 1-A and then I said, "Why don't you appeal your case?" And he says, "It has been appealed." Then I went to the records and found the briefs of the appeal and found out it had been appealed on the basis of dependency, and the appeal [36] board had sustained the 1-A. He was there about half an hour, and he says, "That is not right, I want to appeal it again. My wife," he said, "has gall bladder trouble. She is on the verge of a nervous breakdown, and I don't think that classification is right."

I asked him then if he had an order to report for induction. He says, "Yes, got that order." "Well," I said, "if you have got an order from the board, you better obey it or you will find your-

(Testimony of Frank Robert Armsted.)

self in jail," and he said, "I won't do it. My classification is not right, and I am not going to report." And finally, at the end of the conversation, I said to him, "There is a new directive out, which might be of benefit to you. Why don't you go to your board and talk nice to them and they might be able to do something for you." And he said, "They don't even listen to me down there. I don't get any satisfaction from that board." "Well," I said, "I think you ought to go and talk to them. If I arrange a meeting for you, will you go and"—"No, I won't go," he said, and I said, "I will be glad to do it. I will call on the phone right now," and he said "I will go" and I called up the local board on the phone and talked to the clerk and asked her if she couldn't arrange a meeting for registrant Lindstrom to meet with the board and tell them his predicament, and then he left the office and I have not seen him until this trial.

Cross Examination

By Mr. O'Brien:

I know the time that Mr. Lindstrom was there. It was after the middle of May. I don't know definitely. It is possible it could have been in July.

[37]

[Title of District Court and Cause.]

CERTIFICATE

The time for filing defendant's proposed bill of exceptions having been duly extended herein by order of this court made and entered herein upon the 1st day of February, 1945, up to and including March 2, 1945;

It Is Hereby Certified and Ordered that the above mentioned bill of exceptions, pages numbered 1 to 37, contains all the evidence offered in the case of the United States of America vs. Sivear Willard Lindstrom, Cause No. 15653, and correctly shows the proceedings had on said trial, as I verily believe; and said bill of exceptions is hereby approved, allowed and settled and made a part of the record herein.

Given under the hand of the Judge of said Court, before whom said proceedings were had, this 1st day of March, 1945.

CHARLES H. LEAVY,
United States District Judge for the Western District of Washington, Southern Division

Approved:

HARRY SAGER

Attorney for Respondent

S. J. O'BRIEN

Attorney for Appellant

[Endorsed]: Filed March 1, 1945. [38]

[Endorsed]: No. 10964. United States Circuit Court of Appeals for the Ninth Circuit. Sivear Willard Lindstrom, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 8, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10964

UNITED STATES OF AMERICA

Respondent,

vs.

SIVEAR WILLARD LINDSTROM,

Appellant.

NOTICE OF ELECTION TO ADOPT AS
POINTS ON APPEAL ASSIGNMENTS OF
ERROR APPEARING IN TRANSCRIPT

Comes now the appellant in the above action and hereby adopts as the points upon which appellant intends to rely upon this appeal the assignments of error appearing in the transcript of the record.

Dated this 13th day of March, 1945.

S. J. O'BRIEN

Attorney for Appellant

Receipt of service acknowledged this 13th day of
March, 1945.

HARRY SAGER

Asst. U. S. Attorney

D.B.

[Endorsed]: Filed March 22, 1945. Paul P.
O'Brien, Clerk.

No. 10964

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
Appellant,
UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLANT

S. J. O'BRIEN,
Attorney for Appellant.

Office and Post Office Address:
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Tacoma 2, Washington

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FILED

MAY 16 1945

PAUL P. O'BRIEN,

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JURISDICTION

This is a criminal prosecution brought on the indictment of a grand jury in the court below by the United States against appellant for an alleged violation by appellant of certain provisions of the Selective Training and Service Act of Congress of 1940 (Title 50, U.S.C.A., Section 311). The jurisdiction of the district court rests upon Subdivision 2 of Section 24 of the Judicial Code, as amended giving to the court jurisdiction over all crimes and offenses cognizable under the authority of the United States. Jurisdiction of this appeal rests upon Section 128 of the Judicial Code, as amended (Title 28, Section 225 U.S.C.A.).

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction entered upon the verdict of a jury in a criminal prosecution brought by the appellee against appellant for the alleged willful failure of the appellant to present himself for induction into the armed forces of the United States pursuant to the Selective Service Act of 1940 and regulations made thereunder (Title 50 U.S.C.A., Section 311). Appellant was a married man with dependents and for a considerable period of time previous to the month of January, 1944, he had worked as a machinist in the Seattle-Tacoma shipyards, which plant had at all times been engaged in the construction of vessels for the United States and its allies. Previous to this time and at the request of his employer, appellant had received a deferred classification under the Selective Service Act, which deferment was based on the nature of his employment (Tr. page 29). On January 2, 1944, he was classified by his draft board as 1-A. On April 26, 1944, he was ordered to report to the induction station of the government in Tacoma for possible induction into the armed forces (Tr. page 39). He did not so report upon the day designated, and the indictment in this case is based upon the allegation that this action upon his part was knowingly and wilful, and that he continued to wilfully disobey the order up to the date of the indictment. Appellant did not deny receipt of the notice to report and did not deny that he had failed to report on May 13,

1944, the date fixed in the notice. His defense was based upon the contention that he thought in good faith that the order of induction had been stayed pending a further examination of his status, and that his failure to report on the day specified and thereafter, was therefore not willful.

In support of this defense the wife of appellant testified that after the notice of induction was received, but before the time in which appellant was to report, she made a telephone call on one Chester Chastek to discuss the induction order. Chastek was a Commander in the United States Navy who had been assigned by the Navy as liaison officer to the State Direction of Selective Service as an occupational adviser. His duties were to counsel with industry and draft boards on selective service problems (Tr. page 79).

Mrs. Lindstrom, the wife of appellant, testified that on May 10th she had a conversation with Commander Chastek and that she was advised by him that he was going to the shipyards to get appellant deferred, and that that evening she informed her husband of this conversation (Tr. page 46). Appellant testified that he thought that he did not have to report on May 13th "because of the messages that were given to me by my wife and also by statements in the newspapers" (Tr. page 52). It might be observed that the statements in the newspapers apparently referred to a newspaper story which appeared at that time to the effect that men over

twenty-nine would not be drafted, which, if true, would have made appellant immune from draft since he was then thirty-two (Tr. page 46).

Appellant further testified that it was his belief that Commander Chastek was above the local draft board, and that if he had known that the draft board in Puyallup was the one he had to obey he would have reported for induction (Tr. page 53). He further testified that thereafter he received a letter from the F.B.I. regarding his failure to obey the induction order, and that he submitted this letter to his then attorney, Ralph Rogers. He offered to prove that he was advised by his attorney that the attorney would let him know about the matter when he heard from the United States Attorney. This offer, however, was rejected by the court.

Over the objection of appellant, the court received in evidence Plaintiff's Exhibit No. 18 (Tr. page 77), which purported to be a telegram sent to President Roosevelt with the name of appellant thereon. The exhibit purported to be the original document alleged to have been received by the office of the President. It was dated March 7, 1944. After making some reference to the sickness of the wife of the sender and his financial condition, it stated that the sender "will not appear for preinduction as we consider it a trick of the board." When appellant was upon the witness stand this telegram was exhibited to him by the United States Attorney. He stated that he had sent a telegram to the President but not on that date

(Tr. page 60). He stated specifically that “I didn’t say in the telegram that I was not going to report on my preinduction physical or that I considered it a trick of the board” (Tr. page 67). At the conclusion of this cross-examination the telegram was offered in evidence and was rejected by the court upon the ground that it was not properly identified (Tr. page 60).

Thereafter one Jean Schonborn, the clerk at appellant’s draft board, took the witness stand and stated that this telegram had been received by the local draft board from the state headquarters of the draft board. Over specific and elaborate objection of appellant’s counsel the telegram was then received in evidence and read to the jury (Tr. page 76).

SPECIFICATIONS OF ERROR

Appellant makes the following specifications of error:

1. The court erred in refusing the offer of proof referred to in Assignment of Error No. 1 on file herein, which Assignment of Error is found upon Page 20 of the Transcript of Record.
2. The court erred in admitting over the objection of appellant plaintiff’s Exhibit No. 18 under the facts and circumstances set forth in appellant’s Assignment of Error No. 2, as set forth on Pages 21 and 22 of the Transcript of Record.

ARGUMENT

In presenting our argument, we shall, as permitted by the rules, argue the two assignments of error in inverse order.

The admission in evidence of an alleged telegram from Appellant to President Roosevelt constituted prejudicial error.

This portion of the argument involves appellant's second assignment of error, which is as follows:

"The Court erred in admitting and receiving in evidence plaintiff's exhibit No. 18. The full substance of the evidence relating to the admission in evidence of said exhibit is as follows: Upon cross examination of appellant, the District Attorney exhibited to the appellant's exhibit 18, which purported to be a copy of a telegram dated March, 1944, from appellant to the President of the United States, which telegram purported to set forth the financial condition of appellant and also stated that the person sending the telegram would not appear for pre-induction as he considered it a trick of the board. Appellant testified that he had sent a telegram to the President relating to this matter but denied that exhibit 18 was a correct copy of the telegram, and specifically denied that he had stated in the telegram that he would not report for pre-induction, or that he considered it a trick of the board. Appellant's counsel objected to the admission of this telegram in evidence upon the ground that it was not properly identified, which objection was sustained by the Court. Thereafter the Clerk of appellant's draft board took the witness stand and testified that the local draft board had received the telegram from state headquarters and that it was a part of the witnesses official files.

Appellant again objected upon the ground that the exhibit was not properly identified and upon the further ground that it was not the best evidence. This objection was overruled by the Court and the exhibit was received in evidence" (Tr. pp. 21, 22).

As we have shown in our statement of the case, the order of induction, the failure to obey which was the basis of this proceeding, was dated April 26, 1944, and which order notified appellant to report for induction into the Armed Services on May 13, 1944 (Tr. p. 39).

Plaintiff's Exhibit 18 (Tr. pp. 77, 78) purported to be a certain telegram delivered to the office of the President, which telegram was dated March 7, 1944, and had appended thereto the words, "S. W. Lindstrom." Without setting the telegram forth in full, it may be said that, after referring to the financial and family condition of the sender and accusing the draft appeal board of dishonesty, it was stated that the sender "will not appear for pre-induction as we consider it a trick of the board."

Since the only issue in the case was the issue of whether the failure of appellant to report for induction pursuant to the order of the draft board on May 13, 1944, "and continuing to the date of this indictment" was or was not wilful, it seems clear that, if the telegram was not properly admissible, its reception in evidence was highly prejudicial to appellant. Appellant took the position that he believed in good faith that his induction had been

stayed pending an investigation of his case. The telegram upon the other hand purported to be a statement made by the appellant that he would not even appear for a pre-induction physical examination. The effect of the telegram was to contradict the testimony of appellant and is in effect rebuttal testimony. If it was not properly admitted, it cannot therefore be denied that the action of the court below in receiving it in evidence was highly prejudicial.

Appellant contends that the telegram was not admissible (1) because it was not properly identified; (2) because in any event it was immaterial.

As we have shown, no evidence was offered to identify the telegram as a true copy of the telegram sent by either appellant or any other person at the office of the Western Union in Tacoma. Neither was there any evidence offered to show that the telegram was ever received by the President. All that appeared was that the local Puyallup draft board had received the document from the state office of the draft authorities. It seems almost too obvious to require the citation of authorities that, even if it be deemed material, it was inadmissible. A few decisions, however, may be referred to.

The leading Federal decision on the subject is the case of *Drexel v. True*, 74 Fed. Rep., pp. 12-14, decided by the Circuit Court of Appeals of the Eighth Circuit. There, as here, certain telegrams were offered in evidence against the defendants without proof that they had been sent or that they had been re-

ceived. Holding it inadmissible, the court said:

“The defendants offered in evidence two telegrams, one purporting to be sent by the defendant in error Park Godwin, and the other purporting to be sent by S. Zeimer & Feldstein to Park Godwin. The defendant in error objected to the introduction in evidence of these telegrams, and the court excluded them. Waiving the consideration of other objections to their introduction, it is enough to say the defendants did not lay, or offer to lay, any foundation for their introduction. They did not show, or offer to show, that they were sent by the parties by whom they purported to be sent, or that they were received by the parties to whom they purported to be addressed. No offer was made to authenticate them in any manner whatever, and their genuineness was not admitted. They were, therefore, properly rejected. *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. 285, 289; *U. S. v. Babcock*, 3 Dill. 576, Fed. Cas. No. 14,485; *Smith v. Easton*, 54 Md. 138, 145.”

So, in the case at bar, the government did not show or offer to show that this telegram was sent by appellant or that it was received by the President.

This case was cited by this court with express approval in the case of *Ford v. U. S.*, 10 Fed. (2d) 339, where this court said:

“There is no presumption that a telegram is sent by the party who purports to send it. Before it can be received in evidence, there must be some proof connecting it with its alleged author.”

While it is true that in that case the court held that the telegram involved was admissible, this was based upon admissions which had been made by the

defendant and which was shown by other evidence. Here there were no such admissions. As we have shown, appellant stated that on some other date he had sent a telegram to the President concerning his draft status, but he specifically denied that he had ever sent a telegram stating that he “was not going to report on my pre-induction physical or that I considered it a trick of the board” (Tr. p. 67).

The fact that appellant had denied sending the telegram was recognized by the court below when, in the course of this ruling, he stated that the appellant “denies a portion of the contents of this particular telegram” (Tr. p. 76).

In Vol. 7, Sec. 2129, p. 465, of *Wigmore on Evidence*, appears a rather original illustration of the rule. Professor Wigmore says:

“If, as a part of some facts asserted, Doe’s letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by Doe; thus a letter alone, without the fact that it is Doe’s, is not receivable, simply because it is not the thing offered. By one of the many rules of evidence, Doe’s letter may be admissible; but whatever the particular rule of evidence may be, the element of Doe’s connection with the letter is logically assumed in all. * * *”

This is a perfect illustration of Professor Wigmore’s statement. The thing that was offered purported to be a telegram which had been written and ordered sent by appellant. There was no evidence, however, to show that the telegram was the

telegram of appellant. Consequently it was not admissible.

The same thought was expressed by the Circuit Court of Appeals of the Eighth Circuit in *Hartzell v. U. S.*, 72 Fed (2d) 569, where the court said:

“Ordinarily, where a writing is not shown to have been executed by the defendant, it cannot be offered in evidence against him. To be admissible in a criminal case, either to connect the defendant with the commission of the crime, or to procure a verdict against him, a writing must be established with that degree of certainty recognized as necessary to a conviction. *Sprinkle v. United States* (C.C.A. 4), 150 F. 56. A writing, of course does not prove itself, and there is no presumption that a telegram is sent by the party who purports to send it. *McGowan v. Armour* (C.C.A. 8), 248 F. 676; *Drexel v. True* (C.C.A. 8), 74 F. 12; *Ford v. United States* (C.C.A. 9), 10 F. (2d) 339. The government was therefore bound under the established rules of evidence to prove that Hartzell was the person who sent these messages.”

See also,

State v. Manos, 149 Wash. 60-65, 270 Pac. 132;
Cobb v. Glenn Boom & Lbr. Co., 49 S. E. 1005;
McGowan v. Armour, 248 Fed. 676;
Consolidated Grocery Co. v. Hammond, 175 Fed. Rep. 641;
Jones on Evidence, Vol. 3, p. 605, note 79;
Montgomery v. U. S., 219 Fed. 162-164.

Indeed, this seems to have been the opinion of the court below at the time the telegram was first offered in evidence. As we have shown, when the appellant was being cross examined by counsel for

the government, the telegram was exhibited to him and he testified as before set forth. On the conclusion of his testimony, the telegram was offered in evidence by the government. The court ruled that it was not admissible, stating:

“Your identification does not even meet the elementary rules of evidence. The fact that there is a typewritten signature on a typewritten telegram, you have to have some identification on it” (Tr. 50-60).

The district attorney then called the attention of the court to the fact that appellant had admitted that he sent a telegram to the President about this date, to which the court replied:

“If you desire to further identify it, if you have some one here that received the telegram or accepted the money from him and can verify it as the telegram he sent, or an explanation of the part of the telegram he challenged—I don’t know what it is, but anyway, he questioned a portion of it” (Tr. p. 60).

The government did not then again offer the telegram in evidence, for the rather clear reason that there was no identification. Near the conclusion of the trial, however, the witness Jean Schonborn, the clerk of the local draft board which had jurisdiction over appellant, was recalled. All the testimony by this witness as to the document was the following:

“Q. Showing you Plaintiff’s Exhibit 18 for identification, Miss Schonborn, is that part of your draft board file in this case?

“A. Yes, it is.

“Q. And how did you receive it?

“A. We received it through our state headquarters.

“Q. It is a part of your official file?

“A. Yes, it is” (Tr. p. 75).

Thereupon the court overruled proper objections made by appellant's counsel and admitted the document on the theory that the telegram was a part of the official draft files and therefore admissible without any evidence of their authenticity.

It seems clear that, in the absence of a statute, the position taken by the district court was plainly wrong. We have not found any special statute which gives presumptive validity to the files of draft boards who operate under the Selective Service Act. Such documents, the same as private documents, if not authenticated by competent proof, are hearsay and inadmissible. Furthermore, it should be observed that the witness did not testify that the telegram was a portion of the records of the Puyallup draft board in the sense that it was sent to that office, but merely that it was a part of the draft board file which had been originally sent to the local draft board by state headquarters.

Attention is also directed to the fact that, since the telegram was addressed to the President, it clearly appears upon its face that it was not even a part of the original file of state headquarters.

It may possibly be contended that the testimony of the clerk was the equivalent of a written identification and that it was admissible under the provisions of Title 28, U.S.C.A., Sec. 661, which reads as follows:

“Copies of department records and papers; admissibility. Copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof.”

Certainly there is no help to the government's case arising out of this section. The witness was not authorized to authenticate, either in writing or by oral testimony, any portion of the files of the President in the White House. It is possible that, had the document been otherwise admissible, it might have been authenticated by the President or his secretary. The purpose of authentication is to show that the document is part of the files of the office of the person who authenticates. In so far as the testimony of this witness is concerned, it conclusively appears that she had no knowledge whatsoever as to whether this telegram was ever delivered to the President. The authorities are not numerous, but the few which we have been able to find seem to make it clear that this section only applies to documents which are placed in the files of the authenticating officer pursuant to statute.

A leading case is *U. S. v. Johnson*, 72 Fed. (2d)

614, in which the court, after quoting Sec. 661, *supra*, said:

“It is clear from the language of this section that it applies only to the books and documents having to do with the official records of departments.”

The court further observed:

“The rule does not apply to documents or papers incidentally lodged in an executive department, and forming no part of the official records required to be kept under governing statutes and regulations.”

The same conclusion was reached in *Mohawk Condensed Milk Co. v. U. S.*, 48 Fed. Rep. (2d) 682, by the Court of Claims, where it was held that:

“This court will not accept certified copies as proof of facts as to the correctness of figures contained in documents certified by an official of the government who has received such documents from some other official, department or commission.”

So, in this case, the oral certification of the telegram by the witness was simply a certification of the document which she had received from another office.

In *Rock Island, etc. Co. v. Gournay*, 17 So. (2d) 8, the clerk of a district court attempted to certify as to the contents of certain tax rolls, although not required to keep such rolls. In holding this certification inadmissible, the court said:

“The clerk of the district court is not charged with the duty of preparing and keeping the tax

rolls, and is therefore not qualified to testify as to their contents and meaning.”

So, in this case, the secretary of the Puyallup draft board is not charged with any duty of preserving and keeping telegrams addressed to the President of the United States at Washington, D. C.; and she cannot, therefore, testify that they are a part of the President’s records.

In 20 American Jurisprudence, p. 863, the court said:

“It need not be kept by the officer himself if the entries are made under his direction by a person authorized by him, but it must appear that the keeping of the record or the making of the report is a duty expressly imposed or is one implied from the nature of the official position or duties.”

Certainly there is neither an express or implied duty imposed upon the clerk of the Puyallup draft board to keep in the files of that board alleged telegrams sent to the President of the United States.

The court will also find a very elaborate discussion of this subject with reference to Section 661 contained in *Taylor v. State*, 158 S. W. (2d) (Tex.) 881, where the court cited most of the authorities and among other things said:

“When a document or paper is improperly or incidentally lodged in an executive department and forms no part of the official records authorized or required by law to be kept in that department, the reasonableness of such statutes as a rule of evidence disappears and the provisions

thereof are and of right ought to be inapplicable to any such document or paper.”

However, even if it be assumed for the purpose of argument that the telegram was properly identified in so far as the office of the President was concerned, such identification would go no further than to show that such a document was received in the President's office. This would not be any proof that the telegram was sent by the appellant. The authorities previously cited directly establish this, particularly the quotation from the decision of this court in *Ford v. U. S.* (*supra*), where this court said that:

“There is no presumption that a telegram was sent by the party who purports to send it.”

It is also submitted that, even if it be decided that appellant sent the telegram, nevertheless it should not have been received in evidence because the telegram was sent previous to the induction order here involved and had to do with previous transactions with the draft authorities. The case does not involve a conspiracy or a charge of fraud.

Evidence that appellant in March was of the opinion that the draft board was crooked would not be evidence that, subsequent to April 26, he was of the same opinion. We submit that any document of this character, even if properly identified, would have to be subsequent in point of time to the order which is the basis of the indictment.

It is therefore submitted (1) that the telegram was not properly identified as ever having been received by the President; (2) that in any event there was no proof that it was sent by appellant; and (3) that it was incompetent and immaterial.

Evidence of advice of Appellant's counsel previous to indictment should have been received.

This involves Assignment of Error No. 1, which reads as follows:

“The Court erred in refusing to permit appellant to testify that he laid all the facts and circumstances with relation to his legal duty to respond to an induction notice before his attorney, Ralph M. Rogers, and that he was advised by his said attorney that the matter was in the hands of the United States Attorney and that said attorney would advise the appellant when anything would come up with reference to it. The substance of the evidence rejected in connection with this was substantially as follows: Appellant offered to prove that when he received a notice of reclassification in 1-A, that he consulted with his attorney, Ralph M. Rogers, and that Ralph M. Rogers wrote a letter to a special agent of the Federal Bureau of Investigation, sending copies thereof to the local draft board of appellant and the State head of the selective service, which letter stated the facts with reference to appellant's draft status. Appellant further offered to prove that he received a letter from L. V. Boardman, special agent in charge for the F.B.I., which advised his said attorney that an additional copy of this letter had been sent to the United States Attorney and that further action to be taken by the bureau would be ascertained from the United States Attorney. The

Court denied this offer of proof in the following language: 'I shall deny the offer of proof, except insofar as it deals with the letter from the special agent in charge, if the defendant himself says that he saw the letter, but the letter written by Mr. Rogers detailing the history of the case and the basis upon which deferment was asked would not be competent.' To this ruling the appellant's attorney then inquired what the ruling of the court would be concerning the offer to prove the advice given to appellant by his attorney to the effect that the attorney would let him know when he heard from the United States Attorney. The Court rejected this offer but allowed the letter of the special agent of the F.B.I. to be received in evidence. The grounds urged for the admission of this evidence at the trial were that this evidence went to the question of whether or not appellant wilfully refused to report for induction as required by the notice of induction" (Tr. pp. 20, 21).

The foregoing assignment adequately states the facts involved in this contention and need not be repeated here. The specific evidence relating to this will be found on pages 61 to 66 inclusive of the transcript of record.

As we have shown before, the indictment not only charged the appellant with having knowingly and wilfully refused to obey the order of the draft board to report for induction on May 13, 1944, but also charged that this continued to the date of the indictment, which was filed October 25, 1944.

It appears from the record that in July 1944 a special agent for the F.B.I. wrote a letter to the appellant stating that appellant had been reported

delinquent by the Puyallup draft board, and instructing him to immediately comply with the order of the board (Tr. p. 51). Appellant took this letter to his counsel, Ralph Rogers, who on August 3, 1944, wrote a letter to this F.B.I. agent, which letter was replied to by this agent under date of August 11, 1944 (Defendant's Exhibit A-5, Tr. pp. 67, 68). This letter, after a certain extent reviewing the case, stated that:

“Further action to be taken by this bureau will thereafter be ascertained from the U. S. Attorney.”

Appellant sought to testify that he was informed by his attorney that the matter was in the hands of the United States Attorney and that he, the attorney, would let him know when anything further developed. This offer was by the court rejected (Tr. pp. 62, 64).

We appreciate the fact that ordinarily one charged with a crime cannot, by way of defense, offer testimony that he acted under advice of counsel. Such is not the situation here, however. The letters from the F.B.I. which we have referred to, while not very clear, were at least susceptible of the construction that the whole matter was still under consideration, coming as they did from the branch of the government which was charged with initiating these proceedings. Since the indictment charged a wilful and knowing violation, then, in view of this correspondence which was being carried on between appellant's counsel and the government, evidence that

appellant took no action awaiting further advice from his counsel was evidence that he did not wilfully and knowingly disregard the order of induction. This is peculiarly true, in view of the fact that the jury recommended leniency in its verdict (Tr. p. 4).

For the reasons hereinbefore set forth, it is submitted that the judgment of conviction entered in the court below should be vacated and a new trial ordered,

Respectfully submitted,

S. J. O'BRIEN,

Attorney for Appellant.

No. 10964

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
Appellant,
- VS. -
UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney

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Assistant United States Attorney
Attorneys for Appellee.

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324 FEDERAL BUILDING
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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The defendant was indicted and convicted for violation of the Selective Training and Service Act of 1940 (T. 50, U.S.C.A. App. Sec. 311), for having knowingly refused to present himself for induction when directed so to do by his draft board. (Tr. p. 2).

Appellant states in his brief, at p. 2 under "Statement of the Case" as follows:

“Appellant did not deny receipt of the notice to report and did not deny that he had failed to report on May 13, 1944, the date fixed in the notice. His defense was based upon the contention that he thought in good faith that the order of induction had been stayed pending a further examination of his status, and that his failure to report on the day specified and thereafter, was therefore not willful.”

Since the principal issue made by the defendant during the trial of this cause was the question of whether or not his failure to report for induction was willful we think it advisable to briefly review the evidence concerning his relations with his draft board as we believe it will throw considerable light on his “intent” in failing to comply with the order of induction.

Mr. Lindstrom was required to, and did register with the first registration under the Selective Service Act in October, 1940. In due course he filed his Selective Service questionnaire and was classified 1-A on March 7, 1941. At that time he was not married (Tr. p. 54). The classification made him subject to immediate induction. Upon his receiving his notice of his classification he called upon the Board members seeking deferment. He then appealed his classification on April 18, 1941 (Tr. p. 27). His classification was affirmed by the Appeal Board and on June

17, 1941, he was ordered up for induction (Tr. p. 28). In the meantime the defendant had been in to see his local board and the date of his induction was postponed by the Board on two occasions for thirty days each. At the end of the period of postponement he was reclassified 1-H by reason of a change in the policy of Selective Service which had occurred in the interim and which gave that classification to men over the age of 28, and constituted a deferment (Tr. p. 28). From that time down to January 22, 1944, the defendant was given several different classifications, he having married on March 27, 1941, and having become employed in the Seattle-Tacoma ship yards, by virtue of which he was given certain occupational classifications and deferments (Tr. p. 29).

On January 22, 1944, the defendant was again classified 1-A because his deferment was no longer requested by the said Seattle-Tacoma ship yards, and he was directed to report for a pre-induction physical examination on February 10, 1944 (Plaintiff's Exhibit 8, Tr. p. 31). He did not report for this pre-induction physical examination (Tr. p. 33). In the meantime, on February 7, 1944, he again appeared before the Board asking for a change in his classification and requesting a further appeal. He was again ordered to report for pre-induction physical examina-

tion on March 7, 1944 (Tr. p. 34). He failed to appear for this physical examination but instead called the draft board by telephone advising them that he would be unable to report (Tr. p. 37). However, on the same day he sent a telegram to President Roosevelt stating that he would not appear for pre-induction physical (Tr. p. 77. Plaintiff's Exhibit 18). He then appealed from the 1-A classification and this classification was affirmed by the Appeal Board (Tr. p. 37-38). He was then ordered to report for induction on May 13, 1944 (Tr. p. 39, Plaintiff's Exhibit 13). His failure to comply with this order was the basis of the charge for which he was tried and convicted.

On April 27, 1944, the day after he was mailed the notice to report for induction the defendant appeared at the draft board office. He there tore up the notice of classification resulting from the Appeal Board's affirmance and threw it at the Clerk. He then stated that he would not report, that he did not consider he was properly classified and that he would not abide the rules until the classification he desired was forthcoming (Tr. p. 43-44).

For the next several weeks the defendant pursued a course of conduct in which either he or his wife, acting for him, called upon almost every agency of Selective Service, the United States Attorney's office

and the deferment department of his employer. In all of these contacts he was still defiantly insisting upon a reclassification which would defer him from service.

On May 10th the defendant's wife called Commander Chastek, who was State Occupational Advisor of the Selective Service. She was seeking the Commander's assistance in obtaining deferment for her husband. On July 31, 1944, the defendant telephoned Commander Chastek attempting to secure a deferment (Tr. p. 79). In the latter part of May the defendant and his wife called upon Major Armstead, who was Assistant Occupational Advisor to Selective Service. He complained to the Major that he was not properly classified (Tr. p. 81). Major Armstead warned him that if he had an order from the Board he had better obey it or he would find himself in jail, and the defendant replied that he wouldn't do it, that his classification was not right and that he was not going to report (Tr. p. 81, 82). In the latter part of July he and his wife called at the United States Attorney's office (Tr. p. 57). In July he called upon his Local Board stating that he expected a reclassification, if warranted (Tr. p. 58). After receiving his order to report for induction he applied for a deferment at the ship yards (Tr. p. 58).

On no less than six separate occasions the defendant was directly warned, either in writing or verbally that his failure to comply with the orders of the draft board subjected him to prosecution:

(1). The first order to report for pre-induction physical examination warned him that he would be subject to fine and imprisonment if he failed to report (Tr. p. 33).

(2). The second order to report for pre-induction physical examination contained the same warning (Tr. p. 36).

(3). The order to report for induction contained a warning that "willful failure to report promptly" is a violation and subjects registrant to fine and imprisonment (Tr. p. 40).

(4). The letter directed to him from the Federal Bureau of Investigation contained a warning that failure to obey instructions of his draft board might subject him to prosecution (Tr. p. 51 and 57.)

(5). When he called at the United States Attorney's office, the Assistant United States Attorney there admonished him that he would either have to get the matter straightened out with his draft board or there would be a prosecution. (Tr. p. 56).

(6). Major Armstead, upon whom defendant called seeking deferment, warned him "if you have got an order from the Board you better obey it or you will find yourself in jail" (Tr. p. 81).

Despite these series of warnings the defendant persisted in his refusal to obey the orders of the draft board, even unto the day of trial. His entire attitude toward his draft board and his obligation under Selective Service was succinctly stated in his own telegram to the President (Tr. p. 77).

QUESTIONS INVOLVED

There are two issues presented by this appeal:

(1). Was prejudicial error committed by admission of the telegram to the President.

(2). Was prejudicial error committed by refusing the defendant's offer of proof with respect to certain advice from his counsel.

ARGUMENT

We will consider the issues here in the order in which they are stated in the questions above. That is the same order in which they are presented in the appellant's brief.

The question as to the admission in evidence of the telegram is presented by appellant's Specification of Error No. 2. If we understand appellant's argument, he contends that the telegram was not admissible because no proper foundation was laid connecting it with the defendant, or it was not sufficiently identified. The telegram (Plaintiff's exhibit 18) was offered by the Government at two points during the course of the trial. It was offered during the cross examination of the defendant. The testimony of the defendant concerning this telegram is brief enough that we feel justified in setting it forth here in full. It is as follows (Tr. p. 58):

"I was ordered to report for physical examination on March 7th, 1944. That is the time I called up the draft board and said I couldn't appear on that day because of my wife's condition. I sent a telegram to the President in connection with this matter."

Q. I will show you Plaintiff's Exhibit 18 and ask you if that is the telegram you sent to President?

A. I suppose. That is not the way I worded it.

The Court: Speak up a little louder.

A. That is something like it, I can't remember putting in this statement.

Q. Well, you do recall sending a wire or telegram to the President on March 7th, 1944?

A. I recall sending a telegram.

Mr. Sager: We offer that in evidence."

At this point admission of the telegram was rejected by the Court on the basis that there was not sufficient identification. Later it was again offered by the Government during the course of redirect examination of the witness Jean Schonborn, who was the clerk of the draft board. She identified the telegram as an original document from the draft board's official files (Tr. p. 75). At this point it was admitted in evidence and read to the jury.

The appellant states in his brief, at page 8, that there was no evidence to show that the telegram was ever received by the President. However, the telegram on its face bears the receiving stamp of the White House (Tr. p. 77).

¹The copy of the telegram set forth in the Transcript of Record shows the White House receiving stamp. It is our recollection of the exhibit that it also shows the receiving stamps of the National Headquarters of Selective Service, of Washington State Headquarters of Selective Service, and of the local draft board. If our recollection of the exhibit is correct an examination of it will indicate the course of its transmission from the White House back to the registrant's local board. We respectfully suggest the court's examination of the original exhibit.

It is the Government's contention that the telegram was properly admitted for two separate reasons:

- (1). It was sufficiently identified to make it admissible when first offered;
- (2). When later offered and admitted it was admissible because it was a part of the official records of an Executive department.

THE TELEGRAM WAS SUFFICIENTLY IDENTIFIED IN THE FIRST INSTANCE

In discussing the first proposition we should like to direct attention to the authorities cited by the appellant. The appellant relies largely upon *Drexal v. True*, 74 Fed. 12. It should be pointed out that in that case there was no evidence that the telegram had been received by the addressee which would seem to distinguish it from the instant case in which the telegram itself shows its receipt at the White House.

The appellant also quotes from *Ford vs. United States*, 10 F. (2d) 339. An examination of that case will show that the telegrams involved there were admitted and that this court approved their admission, holding that the proof connecting the telegram with

the sender may consist of circumstantial evidence and then detailing the evidence of the circumstances in that case, which are not unlike the evidence in the instant case.

Appellant also quotes from the case of *Hartzell v. United States*, 72 F. (2d) 569. We wish to point out that in this case, as in the Ford case, *supra*, the cablegrams were actually admitted in evidence and their admission approved by the appellate court.

In the *Hartzell* case the defendant was charged with violation of the mail fraud statute. The evidence in that case discloses that Hartzell, while a resident of London, England, devised a scheme to obtain contributions from persons in the United States to a so-called expense fund for the prosecution of his alleged claim to the vast estate of the buccaneer, Sir Francis Drake. In carrying out this scheme he had many agents in the United States soliciting contributions. The cablegrams which were admitted in evidence were sent by Hartzell from London to certain of these agents in the United States. The cablegrams admitted were the ones received in this country and there was nothing to establish their connection with the defendant, Hartzell, except evidence that they were received, and the fact that the cablegrams themselves indicated they came from London and bore the type-

written name "Hartzell". They were received by persons shown to have been dealing with Hartzell and their contents related to the business between Hartzell and these agents. The same objection was urged to the admission of these cablegrams as is urged in the instant case, viz., that there was no sufficient foundation for their introduction. It is respectfully suggested that the facts regarding the telegram in the instant case are strikingly like those in the Hartzell case. The defendant admitted sending a telegram to the President at about this time "in connection with this matter" (the matter of his reporting for physical examination) (Tr. p. 59). The telegram bore the name of the defendant and his address (Tr. pp. 58 and 51). The defendant, in effect, admitted the sending of the telegram when asked if it was the one he sent to the President, and he answered "I suppose". He qualified this answer by the statement that he couldn't remember certain statements in it (Tr. p. 59). The contents of the telegram all have to do with his alleged difficulties with his draft board. In considering these facts we respectfully direct the Court's attention to the following language of the Court in the Hartzell case which appears at p. 578:

"But as to these and the other cablegrams there is undisputed evidence in the record sufficient to establish their authenticity and defendant's

connection therewith. (a) Large sums of money were forwarded to defendant in London by the agents whom he selected to carry on his work in this country. The cablegrams fit into as related parts of a whole scheme with other circumstantial evidence, the competency of which is not challenged, establishing the connection between defendant and these parties to whom the telegrams were sent. (b) Their subject-matter, considered with this other evidence, competent and undisputed, unquestionably proves plaintiff to be their author. The connection of a defendant in a criminal case with the writing or mailing of a writing may be established by circumstantial as well as direct evidence. (citing cases.)”

This court has applied much the same rule and reasoning in the case of *Lewis v. United States*, 38 F. (2d) 406. This is also a mail fraud case. A letter was admitted in evidence in this case upon evidence that it was received by the witness through the mail and bore the letterhead of the corporation operated by the defendant. It had a signature purporting to be the signature of the defendant, although there was no identification of this signature by the witness, or otherwise. It was urged in this court that there was no foundation laid for its admission. This court approved its admission and said, concerning it, at page 416:

“The question of whether or not the authenticity of a letter has been sufficiently proved *prima facie* to justify its admission in evidence rests

in the sound discretion of the trial judge. (citing cases). The contents of this letter is most persuasive of its authorship. There were scores of letters and documents then and thereafter introduced in evidence bearing the original or facsimile signature of S. C. Lewis. The original letter has been sent here with the record, and the signature to the letter is evidently that of the appellant Lewis."

THE TELEGRAM WAS ADMISSIBLE AS AN OFFICIAL DOCUMENT

In addressing ourselves to this proposition as an additional basis for the admission of the telegram, we reply upon Section 661, Title 28, United States Code, (1944 Pocket Part) from which we quote as follows:

"Sec. 661. Copies of department or corporation records and papers; admissibility; seal

(a) Copies of any books, records, papers, or other documents in any of the executive departments, or of any corporation all of the stock of which is beneficially owned by the United States, either directly or indirectly, shall be admitted in evidence equally with the originals thereof, when duly authenticated under the seal of such department or corporation, respectively."

The appellant, in his brief, (p. 14) attempts to anticipate this section as authority for the admission of the telegram. However, it seems to us that he has misconstrued the cited section and argues that even under this section it was not admissible because not an *authenticated* copy. It is apparent that this section

authorized the admission in evidence of *original* records, as well as *authenticated* copies thereof.

Plaintiff's exhibit 18, the telegram, is not a copy of the draft board's record, but is the original instrument itself and hence under this statute there is no necessity for its authentication or certification. All that is required is that it be identified as an original portion of the official files or records of the draft board.

The clerk of the draft board was not authenticating a portion of the President's files, but was identifying a document from her own official records.

This telegram became an official part of the draft board's records when the telegram was received by the draft board from the State Headquarters. It was thereafter required by regulation to keep the telegram as a part of its records. See Selective Service Regulations 605.21(b), as follows:

"605.21(b) Records to be maintained. Each selective service agency shall retain all correspondence received and a copy of all correspondence sent in its files until authorization for its disposition is received from the Director of Selective Service."

And Section 615.43, as follows:

"615.43. Preparation of Cover Sheets and Filing Folders. After each registrant in Group 1,

Group 2, Group 3, Group 5, or Group 6, is listed in the Classification Record (Form 100), the local board shall open an individual file for him by preparing a cover sheet (Form 53). These cover sheets (Form 53) shall be maintained in a file in the local board. *Every paper pertaining to the registrant, except his Registration Card (Form 1) shall be filed in his Cover Sheet (Form 53).*" (Italics supplied).

Appellant argues, and cites some cases to the effect, that even under this section of the Code, documents which become lodged incidentally in an executive department, do not thereby become an official record. However, by virtue of the Selective Service Regulations quoted above, this telegram was by said regulations required to be kept by the Board as a part of its records.

Draft board files have been held by the courts to be official records entitled to admission in evidence as such under this section. This court has held them admissible in at least two cases.

In *Hopper v. United States*, 142 F. (2d) 181, a recent decision of this court and a Selective Service case, the Court said, concerning the admission of draft board records, at page 186:

"Appellant assigns as error numerous rulings on the admission of evidence. His objections were to exhibits comprising his signed questionnaire, his conscientious objector report, and other docu-

ments relating to his registration and sufficiently identified as official records of the Selective Service Board. There was no error in admitting these exhibits."

This court also approved the admission of a portion of a draft board record as an official record in the case of *Howenstine v. United States*, 263 Fed 1. This case involved a prosecution under the espionage act during or just following the First World War and was based upon the charge that the defendants conspired, etc., to cause insubordination, disloyalty and refusal of duty in the armed forces by soliciting draftees to be fitted with eye glasses that would impair their vision and thus cause them to be rejected from service in the armed forces. There was admitted in evidence a part of the records of one of the defendant's draft board, a report of his physical examination at Hollywood and Camp Lewis. A member of the draft board identified the exhibit as the regular form used and stated that it was returned by mail from Camp Lewis to the local board. This court, upholding its admission, said, at page 7:

"The court admitted the document on the ground that it was a public record. It was undisputed that LeRoy when examined by the local board was accepted and when examined at Camp Lewis was rejected. The record was public and official, and we think it was not reversible error to admit it for the purpose specified in the ruling of the

court. Prima facie it showed the ground on which LeRoy was rejected. It did not preclude the defendants from showing that the cause was otherwise than as there stated, or that LeRoy's eyesight was not in fact defective. That there was in fact any other cause of his final rejection was not suggested by the defense."

In the case of *Cohn v. United States*, 258 Fed. 355 the Second Circuit Court considers the admissibility of authenticated letters from the official files of the Navy Department. These letters consisted of correspondence between one Meade, a Navy yeoman, and the defendant. They were obtained from the defendant's files by a navy inspector. This correspondence was put in evidence in a court martial proceeding against Meade and thereafter transferred to the office of the Judge Advocate General of the Navy. At the trial of Cohn no effort was made to get the original correspondence from the Navy Department, or even authenticated copies thereof, but there was offered in lieu thereof secondary copies made by the navy inspector. In considering the admissibility of such letters if they had been authenticated, the court considers the case of *Block v. United States*, 7 Court of Claims, 406, which latter case had placed a somewhat restricted interpretation upon the admissibility of official records. The court, in the *Cohn* case re-

fuses to follow the restricted interpretation and stated as follows, at page 362:

“We are not inclined to put so narrow a construction upon the statute, and we can see no substantial reason for thinking that copies of such letters as are on file in the record of the proceedings of the court-martial, and which are authenticated by the Department of the Navy as provided in the act, may not be introduced in evidence at the trial of the defendant. The statute authorizes the introduction in evidence of copies of any documents or papers which are required by law to be kept on file in the departments, provided such copies are authenticated under the seal of the department in which the document is kept. It is the opinion of the majority of this court that the statute was intended to apply at least to any document or paper which is by law required to be filed and kept on file in any of the Executive Departments of the government. A document or paper which is required to be so filed and kept on file is in the opinion of the majority of the court an official document as much so as one which is written or published by an officer in his official character or in the performance of an official duty. The word ‘official’ is defined in the New Standard Dictionary as follows:

- ‘1. Of or pertaining to an office or public trust; as official duties.
2. Derived from the proper office or officer, or from the proper authority; authoritative; as, an official report.’

“A paper which must be kept on file in a designated office and which cannot be removed therefrom, pertains to that office, and so becomes of-

ficial. And we are unable to see why the statute is not as applicable to that class of official papers as well as to the other class. The one class is as much within the letter of the statute as is the other, and it is also as much within the reason and the spirit of the statute.

“The introduction in evidence of copies of letters on file in the Department of the Navy at Washington, and which are required by law to be kept there, and which were not authenticated under the seal of the department, was error. Copies so authenticated would have been as admissible as the originals; copies not so authenticated were not admissible as the originals.”

THE DEFENDANTS OFFER OF PROOF AS TO ADVICE OF COUNSEL WAS PROPERLY REFUSED.

This issue is raised by appellant's Assignment of Error No. 1. It is treated more or less casually in his brief, without citation of any authorities.

It appears that this assignment is predicated upon the court's refusal to permit the defendant to testify as to certain advice he was supposed to have received from his then counsel at a time subsequent to the date on which he was required to report for induction.

It is not clear to us, at least, just what the advice of his counsel was supposed to have been.

He states in his brief at page 20,

“Appellant sought to testify that he was informed by his attorney that the matter was in the hands of the United States Attorney, and that he, the attorney, would let him know when anything further developed.”

It is difficult for us to conceive how this purported advice could in any way justify the defendant's failure to report for induction, and particularly so in view of the fact that his failure to comply with the Board's order had occurred on May 13th (Tr. p. 39) and the advice of his attorney was not given until some time after August 11, the date of the letter to his attorney from the F. B. I. (Tr. p. 67).

In this connection the following provisions of the Selective Service regulations, Sec. 633.21(a), would seem to be pertinent.

“Regardless of the time when or the circumstances under which a registrant fails to report for induction when it is his duty to do so, it shall thereafter be his continuous duty from day to day to report for induction to his local board and to each local board whose area he enters or in whose area he remains.”

Under these regulations the defendant was under a continuous duty from and after May 13, 1944, from day to day to report to his board for induction. His failure to do so constituted a continuing violation. Any advice that his attorney may have given him three

months later could not justify his continued failure to comply with the law, nor could it have any bearing upon his "intent" in so failing to comply.

The judgment of conviction should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

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No. 10964

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SIVEAR WILLARD LINDSTROM,
Appellant,
UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

S. J. O'BRIEN,
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PAUL P. O'BRIEN,
CLERK

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THE TELEGRAM

In our opening brief we made the point that (1) there was no evidence to show that the telegram (Plaintiff's Exhibit 18) was ever received by the President; and (2) that there was no evidence to show that, even if such a telegram was received, it was sent by the appellant; and (3) that in any event the telegram was immaterial because it was sent previous to the notice of induction upon which this case is predicated.

By appropriate authority, which is not disputed in the brief of appellee, we showed that even testimony that the telegram was received would not justify its reception in evidence unless there was also proof that appellant sent it.

Pages 10 to 14 inclusive attempt to answer our argument upon this point. The argument seems to be based upon a misconception of our argument and a failure to correctly understand the cases cited by us, since the appellee cites no cases in addition to our authorities, except the case of *Lewis v. U. S.*, 38 F. (2d) 406, which we shall hereafter consider.

Replying to our quotation from *Drexel v. True*, 74 F. 12, it is said that the case is distinguishable because in that case there was no evidence that the telegram was received. We contend that here there was no evidence of receipt of this telegram, but in

any event the case is authority for the proposition that testimony of receipt of a letter or telegram is insufficient to justify their admission in evidence unless connected with the alleged sender.

Two and one-half pages of the brief of appellee are devoted to a discussion of the case of *Hartzell v. U. S.*, 72 F. (2d) 569, which is a decision of the Eight Circuit. All the case really establishes is that circumstantial evidence may be used to make documents prima facie admissible. The case does not hold that, where there is a direct denial by the defendant, this presumption is not overcome; and, furthermore, it appears from the portion of the opinion quoted on page 13 of the brief that there were many facts and circumstances in that case which were definitely proved and which confirmed authorship of the cablegrams. The evidence is not recited other than by the statement in the opinion to the effect that the cablegrams fitted into related parts of the scheme with other circumstantial evidence, "the competency of which is not challenged." Such is not the situation here. While appellant did admit that he sent a telegram to the President somewhere about this time, he specifically denied that this telegram contained the statement that appellant was not going to report for his preinduction physical or that he considered it a trick of the board. (Tr. p. 67.) The issue before the Court, therefore, is whether a telegram, which admittedly was sent, *contained this*

statement. There is in this case no circumstantial evidence that it contained this statement. The portion of the telegram which appellant denied does not fit into any scheme nor it is corroborated or sustained by any other facts or circumstances. In brief, the Hartzell case does nothing more than to reiterate the familiar rule that the sending of a letter or telegram may be proved by circumstantial evidence, a question not here involved.

It is stated in the brief of appellee that "this Court has applied much the same rule and reasoning in the case of *Lewis vs. U. S.*, 38 F. (2d) 406." It is difficult for us to understand this statement. The statement of the facts in the Lewis case overlooks one circumstance which makes the case of no authority here. Among other errors assigned in that case was the introduction in evidence of three letters claimed to have been written by the defendant. The first letter referred to on page 416 of the opinion was testified to as having been received by the witness in response to a letter written by him. In addition to this fact, the original letter was introduced and the signature compared with other letters containing the signature of the defendant, which were admitted. The quotation set forth on pages 13 and 14 of the brief of appellee related to this situation.

The brief overlooks the fact that the authorities, almost without exception, make a distinction between

reply letters and telegrams and a single letter or telegram. The rule is well settled that

“A letter received in the due course of mail purporting to be written by a person in answer to another letter proved to have been sent to him, is *prima facie* genuine, and is admissible in evidence without proof of its authenticity, especially where the alleged writer admits that he received and replied to a letter of the character claimed to have been written to him.” (32 C. J. (2d) p. 609.)

There is an excellent statement of this in *Lancaster v. Ames*, 68 Atl. (Me.) 533, where it is said:

“It is true, as a general rule, that documentary evidence, to be admissible, must be authenticated, and in case of a letter this is ordinarily done by proof of the genuineness of the signature of the writer. When the signature is typewritten, this method of authentication may be difficult, if not impossible. At any rate, it was not tried in this case. But there is a relaxation of this rule in the case of what are called reply letters. The rule does not apply to a letter which is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been duly addressed and mailed. Proof of these facts is sufficient evidence of the genuineness of the reply to go to the jury, without specific proof of the genuineness of the signature. The genuineness is assumed, at least, until the contrary is shown.”

See also 20 Am. Jur., p. 196; 22 C. J. 94.

Here we have no such situation. This telegram was not in reply to any telegram sent by the President.

The rule that a reply letter or telegram is prima facie admissible, by proof of the sending of the original document, is an exception to the general rule which requires authentication of the documents. Since the facts here do not call for the application of the exception, the case, therefore, is not in point since it has to do with an entirely different situation to govern which an entirely different rule is applied.

The other two letters referred to on pages 416 and 417 of the decision likewise are not applicable here. The Court held that the letter of June 14, 1926, was not properly before the court because no sufficient objection was made to raise the question. The letter of March 27, 1926, was shown by evidence to have been dictated by the defendant, so of course this question did not arise.

Referring to the decision of this Court in *Ford v. U. S.*, 10 F. (2d) 339, the brief of appellee states that the facts there, which were held sufficient to support the admission of the document, were "not unlike the evidence in the instant case." We do not so understand the case. In that case the original telegram which was sent was typewritten. There was evidence that it was received at the office of the telegraph company and sent over the wire, and that the agent of the telegraph company took the name of the sender and his address and that the sender was registered at the address on that day. The significant portion of the opinion is that it is then stated

that the defendant offered further proof but "this proof did not deny the authenticity of the wire, but undertook to explain it as relating to something other than the conspiracy charge." Furthermore, there was evidence in the case that the defendant had called up a witness on that day and had told him that he was going to communicate with the person to whom the telegram was addressed. From all of this it was concluded by this court:

"We think that the circumstances were sufficient to constitute a *prima facie* authentication of the wire, and that it was properly received."

These recitals of the facts show that there is no analogy between them. Here the defendant did deny the authenticity of the wire. Even if, under the Ford case, circumstances were shown sufficient to constitute a *prima facie* authentication of Plaintiff's Exhibit 18, this *prima facie* proof was overthrown by the positive denial of the defendant that the exhibit was the telegram which he sent. The Western Union office in Tacoma is about two blocks from the Federal Building. It would have been an easy matter to have subpoenaed in the records of the telegraph company and thus to have established the question of whether the exhibit had been sent by the defendant. This was not done. There are no facts or circumstances whatsoever to refute the positive testimony of appellant that the telegram which he sent did not contain these prejudicial statements.

THE EFFECT OF SECTION 661, TITLE 28, U. S. C. A.

Pages 14 to 19 and a portion of 20, inclusive, are devoted to the proposition that the telegram was admissible as an official document under Section 611. We have discussed this to some extent in our opening brief. We desire, however, to call attention to the fact that, even if the entire argument of appellee be accepted, this would go no further than to show that such a document as Plaintiff's Exhibit 18 was received by the President. *Ford v. U. S.* (supra) holds squarely that

“There is no presumption that a telegram was sent by the party who purports to send it. Before it can be received in evidence, there must be some proof connecting it with its alleged author.”

The fact, if it be a fact, that this telegram reposes in the files of the government would not make it admissible against the defendant in the absence of evidence that he composed it; and, therefore, even if we accept the argument of appellee that, in so far as receipt is concerned, proof of the authenticity of the document is not required, still there must be proof that the defendant sent it; otherwise designing persons could sign all kinds of forged or false names to letters or telegrams, send them to public officials, and then the persons whose names had been forged or used without authority could be indicted, tried and convicted upon, in effect, anonymous and hearsay acts of strangers.

We do not desire to be understood as admitting that the telegram, even as to receipt, was properly authenticated under Section 661. We cited authorities of both the federal and the state courts, which held that the statute does not apply to records not required by law to be kept by a particular officer. No authorities are cited to the contrary. There are cited certain Selective regulations. The first one is the regulation that each agency shall retain copies of correspondence received and correspondence sent. Obviously this telegram was neither correspondence received or sent. The telegram, if it was received, was received by the President, and the fact, if it be a fact, that it was sent by somebody to the state office, and then by the state office to the Puyallup draft board, would certainly not make the regulation applicable.

The second regulation, cited at the bottom of page 15, obviously refers to the records of the registrant as accumulated by the local draft board in dealing with the registrant. We find nothing in the regulation, therefore, that aids appellee, even if executive regulations be taken as constituting "authority of law."

We do not wish to concede, however, that the interpretation of the statute referred to in *U. S. v. Johnson*, 72 F. (2d) 614, and *Mohawk Milk Co. v. U. S.*, 48 F. (2d) 682, referred to in our opening brief, to the effect that Section 661 is restricted to

documents required to be kept by the officer, may be nullified by administrative regulations. It is unnecessary to determine that here, however, because there is no regulation which provides that the President's files shall be placed in the custody of local draft boards.

It is difficult for us to understand the long quotation from *Cohn v. U. S.*, 258 F. 355, set forth on pages 19 and 20 of the brief of appellee. That case held squarely that it was error to admit in evidence copies of letters on file in the Navy Department which were not properly authenticated under the seal of the Navy Department. The case is authority against the position of appellee. In a court-martial proceeding against a Navy yeoman, certain letters from the yeoman to the defendant were obtained from the defendant's files and put in evidence in a court-martial proceeding against the yeoman, and were thereafter transferred to the office of the Judge Advocate General of the Navy. Thereafter Cohn, a civilian, was tried for the same transaction, and the government offered in evidence copies of the letter made by a Navy inspector. The court held that this was error because the original letters were in the custody of the Navy and the only way to prove them was by proper authentication. So, in the case at bar, in order to prove receipt of the telegram by the President, this had to be done, if a copy was introduced, by authentication by the Chief Executive, or, if the

original was introduced, then by the oral testimony of persons in charge of the President's office.

However, we repeat again lest it be overlooked, that in the final analysis it is immaterial whether receipt of the telegram by the President was or was not shown. The controlling question is whether there was any proof introduced to show that appellant ever sent this telegram to the President. He specifically denies that he ever sent a telegram which contained the prejudicial matter which we have quoted. No evidence, either direct or circumstantial, was offered to contradict his testimony. The circumstances, at best, produced nothing but a presumption, which presumption was met by the specific proof.

The court will note that the brief of appellee does not controvert our contention that the telegram, if improperly admitted, was highly prejudicial. Neither does it make any reference to our argument that in any event the telegram was immaterial because it antedated the induction notice here involved. If this had been a case of fraud or conspiracy, it may be that evidence of this character, if properly proved, might have been admissible. Such was not this case, however. Appellant could not have had a wilful design to refuse to obey the induction order until the order had been issued. The alleged fact that he had previously resisted a previous order would not prove that his subsequent action in refusing to obey another order was wilful. We therefore insist that in any event the telegram was entirely immaterial.

ADVICE OF COUNSEL

The opening brief assigned as error the refusal of the trial court to permit appellant to show that, in so far as the charge of a continuing refusal to obey the order of induction was concerned, he acted upon advice of counsel. Since the brief was written, our attention has been directed to *Williamson v. U. S.*, 52 Law. Ed. 278, in which case the Court upon page 293 sets forth with approval an instruction concerning the effect of the advice of counsel where the charge involves the alleged wilful act of the defendant. It is there stated that

“If a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do * * *, and fully and honestly lays all the facts before his counsel, and in good faith and honesty follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of a crime which involved wilful and unlawful intent; even if such advice were an inaccurate construction of the law.”

While it may be admitted that the offered evidence was subsequent in time to the induction order, nevertheless, since the indictment charged a continuing wilful refusal to report up to the time of trial, then under the rule in the *Williamson* case, evidence that appellant was in good faith acting on advice of counsel, in the belief that his alleged deferment would be finally taken care of, was competent.

Respectfully submitted,

S. J. O'BRIEN,
Attorney for Appellant.

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SOUTHERN DIVISION

PETITION FOR REHEARING

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FILED

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Comes now the appellant herein and petitions the court for a rehearing herein for the following reasons and upon the following grounds:

1. Because the case was decided upon a point not raised by the government either in its brief or upon the oral argument;
2. Because the opinion incorrectly states the evidence;
3. Because in any event the point upon which the case was decided was erroneously determined and without giving to appellant any opportunity to be heard thereon.

The briefs in the case, as is stated in the per curiam opinion of the court, considered two legal questions: (1) Whether the introduction of a certain telegram to the President, alleged to have been sent by appellant, was error; and (2) whether testimony of certain advice of counsel given to appellant should have been admitted.

It was not contended by the government that, if the telegram was erroneously admitted, the error was not prejudicial. The first suggestion along that line came in the oral argument when the court orally inquired of counsel for appellant whether there was not evidence enough in the record which was sufficient to justify a verdict of guilty. Inasmuch as no motion in arrest of judgment was made and no contention made in the

assignments of error or appellant's brief challenging the sufficiency of the evidence, if the jury believed it, obviously the question was answered without asking it of counsel in open court and then quoting the oral answer which was given. This was a most extraordinary procedure as was the inquiry which the court submitted to counsel. The fact that there was evidence from which the jury might infer a wilful violation of the act, would certainly not justify this court in exercising the functions of the jury. While it may be conceded that appellant did not respond to the induction notice, he testified that this was on account of the fact that he understood, by reason of a purported conversation between his wife and a Naval officer, that he had been further deferred, and also because he had read newspaper accounts of changes in the draft law which led him to believe that men of his age were not subject to draft. (Tr. p. 52, Appellant's Opening Brief p. 3.) The question of whether, in view of this evidence, appellant's failure to report was or was not wilful was then a question for the jury and, since the telegram expressly referred to this feature of the case, its effect was clearly and plainly prejudicial.

The opinion of the court holds this to be harmless error "in view of such evidence, uncontradicted by appellant, who took the stand, as his deliberate tearing up of his order to report in the office of his Selective Service Board." This is not a correct statement of the evidence. The record shows that the clerk of the draft board testified that on April 27, 1944, the defendant came into her office with his classification card and told her that he would not report for induction and tore up the classifica-

tion card. (Tr. pp. 43 and 44.) This was not the order to report as stated in the opinion of the court. Be that as it may, however, he was not required by the order to report until May 13, 1944, which was over two weeks subsequent to the happening referred to in the court's opinion. While it may be true that the evidence of the clerk of the draft board as to appellant's behavior on April 27 was sufficient to justify the jury in finding a wilful violation, nevertheless there was evidence to the contrary and it was the function of the jury and not this court to pass upon the question of wilfulness. If the telegram was erroneously received in evidence, which this court assumed to be the fact for the purpose of its decision, then, in effect, the evidence of appellant upon the question of wilfulness was controverted (a) by the testimony of the clerk of the draft board referred to in the opinion and (b) by this telegram. For the court to say that this was harmless error because there was sufficient evidence to support the jury's verdict, even though the document erroneously admitted went directly to the question in issue, seems without any justification. Certainly no authorities are cited to support such a conclusion, and no argument to this effect was made by the district attorney. The Constitution protects those charged with crime in federal courts from being compelled to incriminate themselves. Appellants denied that he sent this telegram. To allow hearsay testimony of this character, which was not identified and which purported to amount to a confession of guilt by the appellant upon the only issue in controversy, was a plain violataion of the Constitution, and this is not met by the observation that appellant's attorney admitted

that there was sufficient evidence outside of the telegram to sustain the verdict, or the observation of the court that, because certain evidence was properly admitted and this sustained the verdict, then the doors were open for all hearsay and prejudicial evidence to be admitted.

We have not had time to brief the authorities upon this, but, if a rehearing is granted, they will be further examined. We call the attention of the court, however, to the very well considered opinion of Associate Justice Rutledge, reported in *Wood v. U. S.*, 128 F. (2d) 265, 141 A.L.R. 1318. In that case the defendant, on a preliminary examination before an examining magistrate, had stated that he was guilty. Later he pled not guilty when arraigned. At the trial his admission of guilt before the examining magistrate was received in evidence. The court reversed the case, both because the lower court admitted evidence of the plea on arraignment, and also the plea at the preliminary hearing, since the plea at the arraignment had been withdrawn. The reason given was that this was indirectly compelling the defendants to testify against themselves.

The decision of this court, we contend, is squarely in conflict with the decision of the Supreme Court of the United States in *Malinski v. N. Y.*, 65 Sup. Ct. Rep. 781, decided March 26, 1945. The question before the court in that case was whether certain coerced confessions should have been received in evidence. In considering this, the court said:

“If all the attendant circumstances indicate

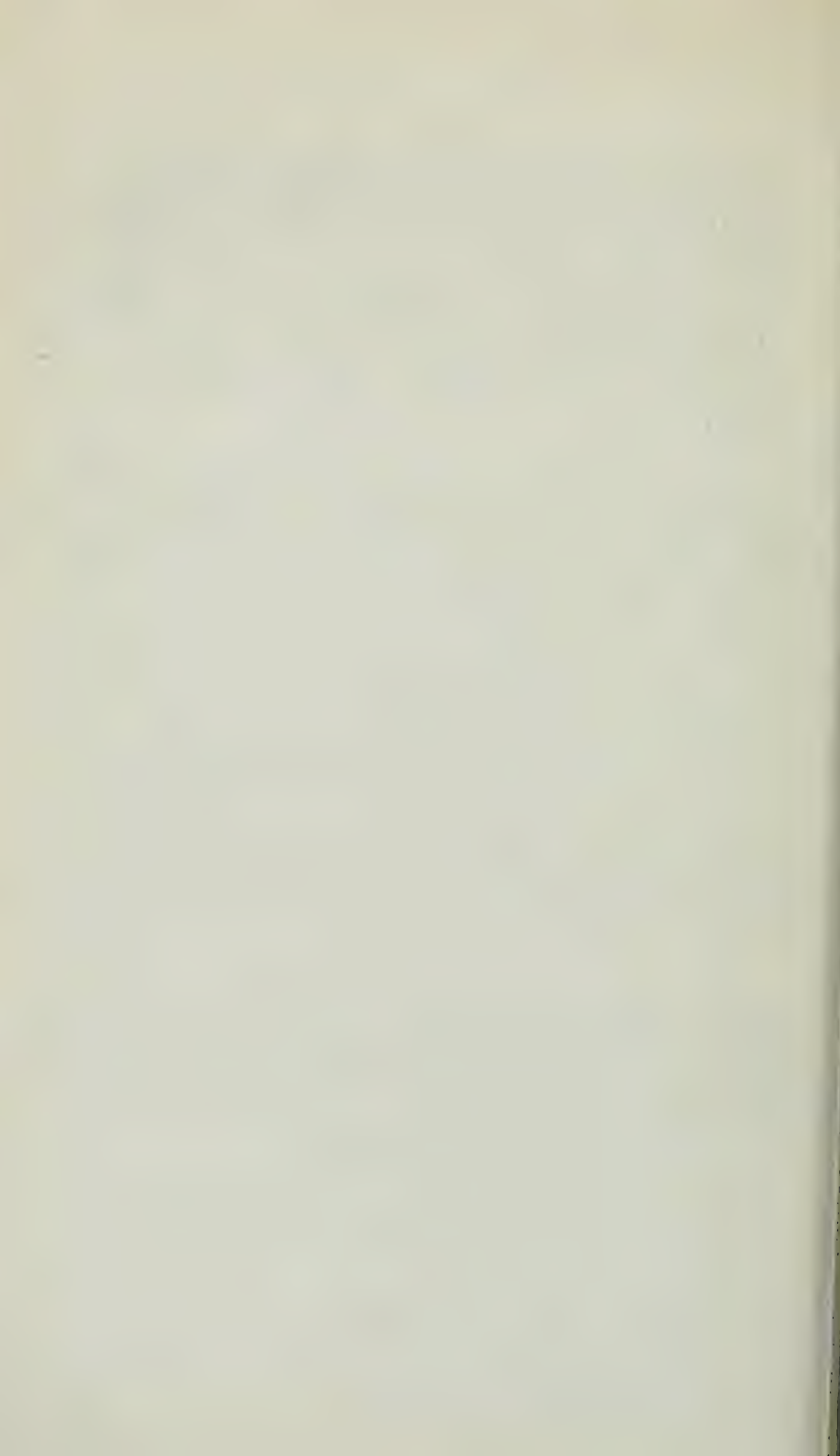
that the confession was coerced or compelled, it may not be used to convict a defendant. *Ashcraft v. Tennessee*, supra, page 154, of 322 U. S., page 926, of 64 S. Ct., 88 L. Ed. 1192. And if it is introduced at the trial, the judgment of conviction will be set aside even though the evidence apart from the confession might have been sufficient to sustain the jury's verdict. *Lyons v. Oklahoma*, 322 U. S., 596, 597, 64 S. Ct. 1208, 1210, 88 L. Ed. 1481."

The above quotation seems to fit squarely and answer the opinion of this court. In this court's opinion, it is, in effect, said that, as long as there was evidence apart from the telegram to sustain the verdict, then it was harmless error to receive the telegram. The Supreme Court of the United States upon the contrary has held that a confession which is illegally received will require reversal of a judgment of conviction even though there be sufficient evidence apart from it to sustain the conviction. See also the decision of the Circuit Court of Appeals of the Eighth Circuit in *Bayless v U. S.*, first reported in 147 F. (2d) 169, which was prior to the handing down of the *Malinski* case, and thereafter on rehearing in 150 F. (2d) 236, where a different conclusion was reached.

This court is in exactly the same position as was the Circuit Court of Appeals of the Eighth Circuit in the *Bayless* case, and it should therefore grant a rehearing and, upon such rehearing, set this judgment aside.

Respectfully submitted,

S. J. O'BRIEN.



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GEORGE CLAYTON,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the District Court for the Eastern
District of Washington, Northern Division*

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

Appellant George Clayton appeals from a judgment and commitment upon conviction under an indictment charging him, with certain others, with conspiracy and falsely pretending to be a United States officer in violation of Sections 76 and 88, Title 18, U. S. C. A. committed within the Eastern District of Washington, Northern Division.

STATEMENT OF THE CASE

This is a criminal action charging appellant, George Clayton, and others with conspiracy to extort money and narcotics from a physician by the technique of impersonation of a Federal narcotics agent. The co-defendants plead guilty at the time of the trial but were not sentenced at the time of the trial.

The principal questions involved are: first, a reference by the District Attorney in his argument to the jury to the background and action of one of the co-defendants, Wilma Shirley Doores, and to the background of the defendants involved, particularly of the appellant, which reference is claimed to be inflammatory and prejudicial; secondly, a direct reference by the District Attorney in his argument to the failure of the defendant on trial to call as a witness one of the co-defendants not on trial; and thirdly, the trial court's stressing and over-emphasizing in his instructions the

subjects of conspiracy and circumstantial evidence to the prejudice of the appellant.

A more complete statement of facts is as follows:

George Clayton and Wilma Shirley Doores were living in a common-law relationship in the outskirts of Spokane, Washington. The defendant Wilma Shirley Doores was commonly known as Shirley Doores. Shirley Doores to a very marked extent lived a life independent of that of her common-law husband, George Clayton, and carried on her own business and business transactions; George Clayton, in turn, carried on his business transactions independently of Shirley Doores. They apparently shared in the ownership of the home they occupied, title being at various times in the name of either one or the other. Shirley Doores was absent for long periods of time without accounting for her whereabouts or activities. She had one brother involved in this transaction, to-wit: Wesley Doores, commonly known as Bunny Doores.

Through Bunny or Wesley Doores, Shirley Doores formed an association with one Edward William Kelly for the purpose of extorting money and narcotic drugs from one Dr. E. H. Teed of Coeur d'Alene, Idaho, a practicing physician of that city from whom Shirley Doores had been making extensive purchases of narcotic drugs. He, the said Edward William Kelly, took upon himself to falsely act as an inspector and officer

of the narcotics division of the Treasury Department of the United States, and as such pretended character, he threatened to arrest Dr. Teed for unlawfully disposing of narcotic drugs to the said Shirley Doores. Shirley Doores, as her part of the conspiracy, was then to obtain money and drugs from Dr. Teed on the theory that she would be able to use such money and drugs to bribe the pretended narcotics agent and thus induce him not to arrest or institute prosecution against Dr. Teed. In connection with that transaction, Kelly and Shirley Doores did go to Coeur d'Alene to see Dr. Teed and did obtain several thousands of dollars from him and some narcotics.

The indictment was in five counts. The only count involving appellant was the conspiracy count, Count I., and then only to the extent that it is claimed he acted generally in an advisory capacity to the other conspirators and that he received a part of the moneys.

Wesley or Bunny Doores testified at length on behalf of the government, claiming personal knowledge of many of the transactions, and prior to the trial of the action, both the defendant, Edward William Kelly, and the defendant, Wilma Shirley Doores, pleaded guilty, but neither one was sentenced at the time of the trial, and in fact, they were not sentenced until following the conclusion of the trial.

Kelly testified at length for the Government, and Wilma Shirley Doores was called and asked one question only (T. of R. p. 363). The trial resulted in a verdict of guilty as to the appellant, George Clayton. During the course of the trial, the District Attorney made certain statements in his argument to the jury that were inflammatory and prejudicial to the defendants and these arguments are set forth in Assignment of Error No. 3 (T. of R. p. 514), and Assignment of Error No. 4 (T. of R. p. 516), and finally the District Attorney was permitted to argue to the jury over the objection and exception of the defendant and appellant, George Clayton, that the appellant had failed to call as a witness in his behalf an alleged co-conspirator, to-wit: Wilma Shirley Doores, a defendant in the same action but not on trial, which argument is set forth fully in Assignment of Error No. 5 (T. of R. p. 518).

The final question presented is raised in Assignment of Error No. 6 (T. of R. p. 519), when the trial court gave the jury additional instructions upon the subjects of conspiracy and circumstantial evidence at the request of the plaintiff and appellee and over the objection of the defendant after the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the minds of the jurors such instructions and to weaken the instructions as given by the Court, to the prejudice of the defendant.

SPECIFICATIONS OF ERROR

Specification of Error No. 1. The District Court erred in overruling appellant's motion, made at the end of the Government's case, to dismiss the indictment on account of the insufficiency of evidence, the contradictory nature thereof, and the lack of creditable proof of the existence of a conspiracy (T. of R. p. 513).

Specification of Error No. 2. The District Court erred in failing to grant appellant's motion, made at the conclusion of all of the testimony, for a directed verdict of acquittal, or a dismissal of the indictment on the grounds of the insufficiency of the evidence, the contradictory nature of the testimony of the Government, and that all the circumstances relied upon by the Government were susceptible of two constructions, and the District Court was required as a matter of law to find that such circumstances indicated innocence rather than guilt on the part of the appellant (T. of R. p. 513).

Specification of Error No. 3. That the Court erred in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

“Mr. Connelly (District Attorney): It is going to be argued by the defense that this old mother loaned her son \$2,000 * * *. It is not a story which can be considered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an ex-

planation as to where the money came from, in what form it was, whether or not it was ever in a bank, or whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important law suit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the underworld. Don't forget that for a moment. If a jury's intelligence can be stultified and insulted by a defense of that character, I say the bars are down—

“Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

“The Court: I will sustain the objection, and instruct the jury to disregard the last statement.

* * * * *

“Mr. Connelly: * * * Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

“Mr. Smith: This argument is outside the case, and I object to it.

“The Court: “I think it s perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper.

“Mr. Connelly: * * * Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her makeup, she has admitted she did it, but she will not lie for anyone, and she hasn’t lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

“Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

“The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

“Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly’s statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton’s explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

“I submit the verdict should be guilty.

“Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

“The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted.” (T. of R. p. 514)

Specification of Error No. 4. The Court erred in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

“Mr. Connelly: * * * What can Kelly hope to get out of it? Nothing. He has pled guilty here.

“Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores’ deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the arguments of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

“Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what

for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

“Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

“The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

“Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

“I submit the verdict should be guilty.

“Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

“The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted.” (T. of R. p. 516)

Specification of Error No. 5. The District Court erred in permitting the United States District Attorney to comment in his argument to the jury, over the objection and exception of the defendant, that the defendant, George Clayton, failed to call as a witness in his behalf an alleged co-conspirator, Wilma Shirley Doores, a defendant in the same action but not on trial, which argument was as follows:

“Mr. Connelly: * * * What can Kelly hope to get out of it? Nothing. He has pled guilty here.

Shirley Doores had pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doore's deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the argument of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

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Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from that testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in the case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted." (T. of R. p. 518)

Specification of Error No. 6. The District Court erred in further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over the objection of defendant after the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the jury's mind said instructions and, further, to weaken the instructions as given by the Court, to the prejudice of the defendant, which was as follows:

"Any discussion of the instructions?"

Mr. Connelly: Yes. Shall I state it in open court or at the bench?

The Court: Come up here.

(The following proceedings were then had at the Court's bench, without the hearing of the jury:)

Mr. Connelly: I listened very carefully, as carefully as I was able to, and it is not clear to me that in the Court's definition of an overt act necessary to consti-

tute the crime, whether it might be the overt act of any of the defendants other than the defendant charged against in this case.

Mr. Smith: I think Your Honor has fully instructed on that point. The only exception I might take is to that very thing. They are very fine instructions.

The Court: They do not prove the overt act was by this defendant.

Mr. Smith: You have fully instructed on that.

Mr. Connelly: I feel that the last instruction on circumstantial evidence excludes all the direct testimony of the conspiracy, because each time you say 'you will find the defendant not guilty,' if the case is based upon circumstantial evidence, which in this case it is not. It is a combination of direct evidence and circumstantial evidence.

Mr. Smith: We feel that the instructions as given fully cover the case, and that to give any more at this time will simply emphasize certain matters and it will be to the prejudice of this defendant, and we object to the giving of any further instructions.

The Court: The exception will be allowed.

Mr. Smith: I have no exceptions to the instructions as given.

(Whereupon, the following proceedings were

then had in the presence and hearing of the jury, to-wit:)

The Court: I do not want to over-emphasize any instruction that I have given. The instruction on conspiracy is rather complicated and difficult, as you realize, and in carrying out a certain suggestions made by Mr. Connelly, I am in no way emphasizing any particular point.

I will again call your attention to the fact that in the proof of overt acts the burden the Government has is to prove the body of the conspiracy beyond all reasonable doubt, as to the conspiracy showing the agreement, which is the gist of the action, and to also show one of the overt acts alleged was committed in furtherance of the conspiracy.

That does not mean any particular one or more than one. They must prove one or more of the overt acts alleged was committed by one of the defendants in furtherance of the conspiracy.

Mr. Connelly also has the feeling that by instructing you upon circumstantial evidence that you might have the idea I was limiting your consideration of the case to circumstantial evidence.

The Government in this case is attempting to make its case both on the claim of direct evidence and circumstantial evidence. I have instructed you about your consideration and the tests you will use in testing the

testimony of Wesley Doores and Edward Kelly, and also the general tests that you will use in passing upon the testimony of witnesses without any specific classification, the Government contending that under the testimony of Wesley Doores and Edward Kelly it has direct evidence of the defendant having participated, but it is also relying upon circumstantial evidence, and you will consider the instructions as to each, and in considering the question of circumstantial evidence you will follow the instruction I have given you and weigh such testimony according to the standards I have laid down for you in testing circumstantial evidence.” (T. of R. p. 519)

Specification of Error No. 5.

The District Court erred in permitting the United States District Attorney to comment in his argument to the jury, over the objection and exception of the defendant, that the defendant, George Clayton, failed to call as a witness in his behalf an alleged co-conspirator, Wilma Shirley Doores, a defendant in the same action but not on trial, which argument was as follows:

“Mr. Connelly: * * * What can Kelly hope to get out of it? Nothing. He has pled guilty here.

Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of

the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the argument of his counsel are true, the answer to all of it would be a simple statement of fact upon the witness stand from this girl who has pled guilty already.

Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by cir-

cumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in the case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted." (T. of R. p. 518)

SUMMARY OF ARGUMENT

Briefly summarized appellant's contention is this:

That the District Attorney was permitted to argue to the jury over the objection of the defendant that the defendant had failed to call as a witness in his own behalf a co-defendant, to-wit: Wilma Shirley Doores, who had entered a plea of guilty prior to the commencement of the trial, upon whom judgment had not been passed and who was not on trial, the witness being equally available.

Wilma Shirley Doores, commonly called Shirley Doores, was one of three co-defendants. She and defendant Kelly pleaded guilty prior to the commencement of the trial, Kelly testifying in behalf of the Government. Neither defendant Shirley Doores nor defendant Kelly was sentenced until after the trial, so that on the trial of appellant Clayton, Shirley Doores was an alleged co-conspirator and alleged co-defendant not on trial (T. of R. pp. 12 and 13). In the argument to the jury, the Government's attorney, Mr. Connelly, was permitted to argue, over the objection of appellant, that if the contentions of the appellant Clayton were true, all he had to do was place the co-defendant, Shirley Doores, on the witness stand, and he repeatedly called attention to the fact that the appellant had not placed this co-defendant on the stand, saying as follows:

“Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the argument of his counsel are true, the answer to all of it would be

a simple statement of fact upon the witness stand from this girl who has pled guilty already.

Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here." (T. of R. p. 518)

Naturally this argument was highly prejudicial. The attention of the jury was dramatically called to the importance of her testimony and of course the jury was asked to indulge in the presumption that the appellant did not dare call her because if she testified she would involve him in the conspiracy.

The general rule that if a defendant has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do so creates a presumption that the testimony, if produced, would be unfavorable, has no application to the nonproduction of co-defendants.

The defendant, Shirley Doores, could not be compelled to testify by either the appellant or the government if she stood on her constitutional privilege. Nei-

ther the Government nor the appellant had any means of knowing in advance what she would do. She was called by the Government for one question (T. of R. p. 363), and answered but one question, to the effect that her name was Shirley Doores and she was not married to the appellant, George Clayton. She was questioned in the absence of the jury by the Court and counsel (T. of R. pp. 360-363) and gave every indication then that she was going to refuse to answer questions; she then promptly answered the question put to her, but still there was no assurance to either the Government or appellant that she would answer any further questions.

She said (T. of R. p. 362): "I will not testify, then.

"The Court: You will not answer the question?

"Shirley Doores: No, not right now."

If the appellant had placed her on the stand and she had refused to testify, this refusal might have been construed by the jury to the appellant's disfavor. As far as the record discloses, Shirley Doores was no more available or accessible to one party than to the other. Therefore, the exception to the general rule that no presumption arises where witnesses are equally accessible or available has its counterpart in this case where she was not available really to either party as a witness since she could not be compelled to testify by either party, and so the jury should not have been permitted

to indulge in any presumption that she would have testified unfavorably to the appellant.

The Court appreciated this, for he says in part in his opinion (T. of R. p. 22): "I assume that my failure to instruct the jury to disregard the argument concerning the inference (that the testimony if produced would be unfavorable to appellant) is but tantamount to an affirmative instruction explaining the inference."

In

Hopkins v. State, 146 Pac. 917.

where several defendants were jointly charged with pandering and upon the separate trial of the defendant Hopkins, the prosecuting attorney was permitted to comment on the failure of the defendant on trial to introduce as witnesses in his behalf co-defendants not on trial, and the Court in discussing the matter calls attention to the fact that a co-defendant not on trial, of course, could not be compelled to testify by either party. The court said in part as follows:

"The county attorney and his assistant, in using the language above quoted, misstated the law, and such statements are contrary to the spirit of the law, which seeks, by well-established rules, to prevent the possibility of prejudice. The language used conveys the idea, and was intended to convey the idea, that the defendant on trial had it in his power to compel each of his co-defendants, whether willing or unwilling, to testify in his behalf. That this language was prejudicial to the defendant cannot be doubted. The general rule that, if a defendant

has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do so creates the presumption that the testimony, if produced, would be unfavorable, and is a circumstance against him, has no application to the nonproduction of co-defendants. If the defendant had called his co-defendants as witnesses in his behalf, they could not have been compelled to testify, and, if called, they had then refused to testify, this might have been construed by the jury to the defendant's disadvantage. * * *

“Under the constitutional and statutory provisions, no presumption could arise from the failure of the defendant on trial to call his codefendants as witnesses in his behalf, and the jury should have been left to try the issue upon the evidence introduced. The court, by refusing to sustain the objections to the improper remarks, and in refusing to instruct the jury that, under the law, the defendant had no more right than the state had to call his codefendants as witnesses, and that his failure to call certain codefendants as witnesses should create no presumption against him, and the court's failure to direct the jury to disregard such improper remarks as not within the limits of legitimate argument, gave the jury to understand that they might properly and lawfully consider the same, all of which was manifestly prejudicial to the substantial rights of the defendant.”

To the same effect see

Duncan v. State, 2 Pac. (2d) 285;

Abrams v. State, 170 N. E. 188;

Hancock v. State, 241 Pac. 1108;

United States v. Laudani, 134 Fed. (2d) 847;

Moyer v. United States (Ninth Circuit), 78
Fed. (2d) 624-630.

In

Abrams v. State, 170 N. E. 188, *supra*,

an attorney was tried for subornation of perjury, being charged with procuring one Abraham Goldman to commit perjury in a divorce case. Goldman had apparently been found guilty of the offense of committing perjury in the same case but his testimony was not in the case at bar and he was not called as a witness by either the state or the defendant; and then, in his argument to the jury, the prosecuting attorney was permitted to make a rather vicious attack upon the defendant's case because he had not placed Goldman on the witness stand, intimating that the defendant did not do it on the knowledge that Goldman would testify that he was suborned by Abrams to commit the crime of perjury. the inference that the government's attorney in this case left with the jury. The court said in part:

“* * * ‘Why did not the defense put him on the witness stand?’ and made a rather vicious attack upon the defendant's case because defendant did not place Goldman upon the witness stand, and intimated, as already stated, that the defendant did not do it because of the knowledge that he would testify that he was suborned by Abrams to commit the crime of perjury. Well, perhaps the knowledge of what Goldman would testify to could just as easily be ascertained by the state as by the defense, and if Goldman would have testified to that which

would convict Abrams, if a witness for the defense, we do not see why the state did not use him for the purpose of convicting Abrams; and the argument, under the circumstances, was highly improper. It was not for the defendant to prove himself innocent of the crime, and he need not put the witness upon the stand, to be subjected to cross-examination of the prosecutor, unless the state had made a case irrespective of that witness, and then it would be only a question of judgment on the part of the trial lawyer. We think the conduct of the prosecutor in the argument of this case was not warranted and was misconduct."

In

Moyer v. United States, 78 F. (2d) 625 (9th Circuit),

a conspiracy case, the Court instructed the jury that there was testimony that at least one or two of the other conspirators (and co-defendants) were present in court, and that the rule was that when any witness who knows the facts is available and not called to testify, then the jury might assume that such witness if called would testify against the party who should have called him. This, without advising the jury whether it is the duty of the government or the defendant to call other defendants who had pled guilty and were not on trial. There was only one of the defendants not on trial available as a witness who had not been called. This was a man named Grade. The Court said, in part, as follows:

"Unquestionably Grade could testify whether or not he was present at a conversation or conversa-

tions with defendant Moyer on or about February 21. He had interposed a plea of guilty to the conspiracy charge. He had a right to remain silent respecting the facts of the case whether called upon to make a statement by either the prosecution or defense, unless called as a witness. The instruction left to the jury to determine whether he should have been called as a witness and by whom. They could have determined that if the defendant was testifying truthfully he should have called him to testify, and as he did not call him they could assume his testimony would not be in accord with that of Moyer. The effect would be that the jury could and might assume that if called as a witness Grade would corroborate the testimony of Pache. The rule we think should not be applied in the case of one who might be called as a witness who is a co-defendant and has entered a plea of guilty, and as to whom sentence has not been imposed."

We submit that the comment of the Government's attorney was improper and prejudicial and that under the authorities the judgment of conviction herein should be set aside.

SPECIFICATION OF ERRORS NOS. 3 AND 4 CONSIDERED TOGETHER

Specification of Error No. 3.

That the Court erred in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

"Mr. Connelly (District Attorney): It is going to be argued by the defense that this old mother loaned her son \$2,000 * * *. It is not a story which can be con-

sidered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an explanation as to where the money came from, in what form it was, whether or not it was ever in a bank, or whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important law suit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the underworld. Don't forget that for a moment. If a jury's intelligence can be stultified and insulted by a defense of that character, I say the bars are down—

Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

The Court: I will sustain the objection, and instruct the jury to disregard the last statement.

* * * * *

Mr. Connelly: * * * Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

Mr. Smith: This argument is outside the case, and I object to it.

The Court: I think it is perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper.

Mr. Connelly: * * * Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.

Mr. Connelly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all those circumstances. I submit the truthfulness of Kelly's statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton's explanation of that, that he

gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of all of the evidence in this case, and is entitled to evaluate any argument made upon the basis of the evidence submitted."

Specification of Error No. 4.

That the Court erred in permitting the U. S. District Attorney over the objection and exception of the defendant to argue as follows:

"Mr. Connelly: * * * What can Kelly hope to get out of it? Nothing. He has pled guilty here.

Shirley Doores has pled guilty, and in that connection, talking about witnesses who did not appear and those who did, has it occurred to you that the matter of the deed, paying the money, the exchange of deeds, the absence of Clayton from the meeting when the conspiracy was planned, if this were only Shirley Doores' deal with Kelly and Bunny, and if that is what he is clinging to on this indictment for conspiracy, if the contentions of this man Clayton and the arguments of

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I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted."

SUMMARY OF ARGUMENT

These two assignments are both directed against prejudicial matters and matters not in evidence argued to the jury by the Government's attorney, particularly statements that a co-conspirator, Shirley Doores, admitted her guilt, that she didn't lie for anyone, that "You are dealing with people of the underworld. Don't forget that for a moment." That "Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties."

ARGUMENT

The United States District Attorney, Mr. Connelly, over the objection of the defendant and appellant, went outside of the record and argued matters not contained

in the evidence and matters that were highly prejudicial to the defendant and which must have had an effect on the minds of the jurors, particularly when considered with the other assignments of error argued in this cause. For example, without any evidence to support it, the Government's attorney referred to a co-conspirator, Kelly, not on trial but who had pled guilty before the trial and testified on behalf of the Government:

“Mr. Connelly: * * * Kelly was man enough to plead guilty and testify, and there was nothing I could offer him. The penalties in this court are fixed by the Court alone. District Attorneys are not even allowed to make recommendations as to penalties.

Mr. Smith: This argument is outside the case, and I object to it.

The Court: I think it is perfectly proper argument, and I will not sustain the objection. Under the instructions you have requested, I think it is proper.” (T. of R. pp. 496 and 497)

The defendant had a right to show, of course, that Kelly's sentence had not yet been passed. It was obvious that he was seeking some favor or some additional consideration when his sentence was passed, and it was a matter entirely proper to bring before the jury. But the argument set forth above was clearly outside the record. There was never any evidence to support it, and, of course, it was highly prejudicial as being in-

tended to offset the natural assumption that the jury would have that the man Kelly was expecting some favor.

Again Mr. Connelly, the Government's attorney, in his argument referring to Shirley Doores, another co-defendant not on trial but who had pled guilty and was awaiting sentence, stated as follows:

“Mr. Connelly: * * * Shirley Doores, a narcotic addict, broken in health, taking bismuth from Dr. Teed—and he told you what for—has reached the end of her lane. Apprehended in this case, with whatever elements of courage she has left in her make-up, she has admitted she did it, but she will not lie for anyone, and she hasn't lied for anyone, and she has not taken this witness stand and supported her common-law husband in one single iota of his claim here.

Mr. Smith: I object to the statement that Shirley Doores would not lie for anybody. I do not think it is a fair inference to draw from the testimony.

The Court: The jury is the exclusive judge of all the testimony, and will pass upon the argument, and give it such weight as it sees fit.” (T. of R. p. 498)

The Government's attorney repeated in another part of his argument that the co-defendant, Shirley Doores, did not and she would not lie for anybody, all of which statements were properly objected to. This was in the closing remarks of the Government's attorney when he said as follows:

“Mr. Connolly: * * * We do not prove conspiracy ordinarily by direct evidence alone, but also by circumstantial evidence, and you will weigh all these circumstances. I submit the truthfulness of Kelly’s statement is apparent, that this man Clayton had the money, and he quit his job and went looking for a place to buy. That deed was never recorded, and he did get that \$1250. You have heard Clayton’s explanation of that, that he gave the deed to her. Shirley did not testify to that, and Shirley will not lie for anybody.

I submit the verdict should be guilty.

Mr. Smith: May I except to the remarks of counsel and ask that the jury be instructed to disregard it, as not based on any evidence in this case.

The Court: The jury is the exclusive judge of all of the evidence in the case, and is entitled to evaluate any argument made upon the basis of the evidence submitted.” (T. of R. p. 498)

These remarks were properly objected to, but the Court permitted them, and thus the jury was left with the final impression that here was a witness the defendant had failed to put on the stand because she wouldn’t lie to anybody about anything. The Court overruled the objection and immediately began instructing the jury. These remarks couldn’t have been in a position more prejudicial to the defendant. The infer-

ence obviously was the appellant was afraid of her because she would tell the truth and the truth would convict him.

Now, there is no testimony of any kind in the record that either the Government or anyone else could point out that would warrant such a statement on the part of the Government's attorney in his argument. The Government did not have too much confidence in Shirley Doores as a witness because when the Government put her on the stand, she was asked only one question as to whether she had ever been married to appellant. There was absolutely no evidence to support the Government's attorney's comment. It couldn't be inferred from anything before the Court, and of course, there was no testimony of any kind to support it, and the constant reiteration that Shirley would not lie must have had a profound effect on the jury. These remarks were something that the defendant could not combat in any way, save by objection to the argument. They were a part of the Government's closing argument. The prejudice created by such remarks is so obvious that merely to call attention to them would seem to be sufficient. There is an excellent discussion sustaining appellant's contention in this respect in *Wigmore on Evidence*, Third Edition, Volume Six, Section 1806.

The further implication of the argument is that appellant had attempted to prevail upon Shirley Doores

to testify in his behalf and that she had refused to lie for him. Such an implication is entirely outside of the facts in this case and highly prejudicial because it indicates that the Government's attorney was in possession of facts not disclosed by the evidence indicating appellant had attempted unsuccessfully to suborn perjury. There is no suggestion that defendant, Shirley Doores, was ever approached either to testify or not to testify in appellant's behalf, and to inject forcibly into the closing sentence of the Government's concluding argument such a thought is to place upon appellant a burden which we feel the law does not contemplate or approve.

Again in his argument (T. of R. p. 498), the Government's attorney argued that the jury were dealing with people of the underworld and not to forget it for a moment, after just having referred to the appellant's mother's testimony, there being no evidence that she had any connection with the underworld or anything to do with it. The argument excepted to is as follows:

“Mr. Connelly (District Attorney): It is going to be argued by the defense that this old mother loaned her son \$2,000 * * *. It is not a story which can be considered reasonable by any test of reason, in weighing the testimony, because she does not even offer you an explanation as to where the money came from, in what form it was, whether or not it was ever in a bank, or

whether or not her son was son enough to give her a note to evidence the indebtedness, and you are sitting here as triers of the facts in an important law suit. I can only say to you do not be led astray by sentimental considerations. You are dealing with people of the underworld. Don't forget that for a moment. If a jury's intelligence can be stultified and insulted by a defense of that character, I say the bars are down—

Mr. Smith: Just a moment. We will have to raise an objection to an argument of that kind. I think it is highly prejudicial.

The Court: I will sustain the objection, and instruct the jury to disregard the last statement." (T. of R. p. 496)

It will be noted that the only objection the Court sustained was to the last sentence and not to the statement that they, the jury, were dealing with people of the underworld.

The combined effect of these inflammatory and prejudicial remarks is such that it could not have but affected the jury and influenced their verdict, particularly when consideration is given the other assignments of error.

Specifications of Error Nos. 1 and 2.

Specification of Error No. 1. The District Court erred in overruling appellant's motion, made at the end

of the Government's case, to dismiss the indictment on account of the insufficiency of evidence, the contradictory nature thereof, and the lack of creditable proof of the existence of a conspiracy (T. of R. p. 513).

Specifications of Error No. 2. The District Court erred in failing to grant appellant's motion, made at the conclusion of all of the testimony, for a directed verdict of acquittal, or a dismissal of the indictment on the grounds of the insufficiency of the evidence, the contradictory nature of the testimony of the Government, and that all the circumstances relied upon by the Government were susceptible of two considerations, and the District Court was required as a matter of law to find that such circumstances indicated innocence rather than guilt on the part of the appellant (T. of R. p. 513).

The rule is well established in the Federal Courts that if the evidence is as consistent with innocence as with guilt, it is insufficient to sustain a conviction.

The Circuit Court for the Third Circuit says in *Yusem v. U. S.*, 8 Fed. (2d) 6:

“When all the facts are considered, we are unable to reach any other conclusion than that the statement showed nothing more than a possible carelessness, and not a scheme and artifice knowingly and wilfully devised with intent to defraud. ‘Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury

to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.' *Hart v. United States*, 8 Fed. 799, 808, 28 C. C. A. 612; *Union Pacific Coal Co. v. United States*, 173 Fed. 737, 70, 97 C. C. A. 78; *Wright v. United States*, 227 Fed. 855, 857, 142 C. C. A. 379; *Joseph Wiener et al., v. United States* (C. C. A.) 282 Fed. 799, 801."

In *Edwards v. U. S.*, 7 Fed. (2d) 357, the Eighth Circuit said:

"If the evidence, taken as a whole, is as consistent with innocence as with guilt, then the conviction should not be sustained. In *Wright v. United States*, 227 Fed. 855, 857, 142 C. C. A. 379, 381, speaking of the defendant, this court said: 'The legal presumption was that he was innocent of that crime until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence that is as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction.'

"See, also:

Wiener et al. v. United States (C. C. A.), 282 Fed. 799;

Turinetti v. United States (C. C. A.), 2 Fed. (2d) 15."

Copeland, et al., v. U. S. (C. C. A.), 90 Fed. (2d) 78;

Kassin v. U. S., 87 Fed. (2d) 183.

Appellant was found guilty by the verdict of the jury of count one of the indictment which contained five counts (T. of R. Vol. 1, p. 13). In only one of the overt acts in furtherance of the conspiracy is appellant named, to-wit: overt act eleven (T. of R. Vol. 1, p. 7).

It is charged that between April 9, 1944, and May 25, 1944, the defendant, Wilma Shirley Doores gave to the defendant, George Clayton, approximately \$3000.00 in cash, which he knew had been unlawfully received from Dr. E. H. Teed of Coeur d'Alene by the defendant, Wilma Shirley Doores, on the pretention that she, Wilma Shirley Doores, could prevent a purported narcotics inspector, impersonated by defendant Edward William Kelly, from arresting the doctor for unlawfully disposing of narcotics.

The evidence introduced by the Government took a very wide range, and although the defendants, Wilma Shirley Doores and Edward William Kelly, had pleaded guilty before the commencement of the trial, it is difficult to imagine how the Government could have introduced more proof against *them* had they actually been on trial.

Giving the testimony its full weight against the ap-

pellant, it amounts only to this: Appellant and Shirley Doores occupied the same dwelling house, living together in a relationship somewhat akin to that of a common law husband and wife, although the defendant, Shirley Doores, did not habitually go by appellant's surname.

Defendant, Shirley Doores' brother, Bunny Doores, after serving a term in the Washington State Penitentiary, had made his home with his sister and appellant. Through Bunny Doores, Shirley became acquainted with defendant, Kelly, a drifter who frequented pool halls and card rooms.

Beginning in December of 1943, Shirley had been securing narcotics from Dr. E. H. Teed of Coeur d'Alene. The narcotic prescriptions (plaintiff's exhibits 1 to 16) with the exception of plaintiff's exhibits 1 and 2, were issued in the name of Mike Sanders (T. of R. Vol. 1, pp. 37-53).

At a dinner in appellant's home at which it is claimed appellant was present, Defendant Shirley Doores suggested to Bunny Doores and defendant Kelly, that she "had enough on this doctor for the sale of narcotics" to get some money from him (T. of R. Vol. 1, p. 103).

It is apparent from the testimony of Defendant Kelly that if appellant Clayton was present as claimed, he had no part in originating the scheme and was at most a bystander or onlooker.

It is to be further noted that the testimony of defendant Kelly and Wesley "Bunny" Doores is flatly contradictory as to who originated the scheme.

(Testimony of Edward William Kelly)

"Q. Shirley brought up this matter about some doctor at Coeur d'Alene? A. Yes, sir.

Q. And Shirley spoke about the fact he would be an easy guy to get some money out of? A. That is right.

Q. And you and Bunny were both sitting there and heard it? (40) A. Yes, sir.

Q. And Shirley mentioned the fact that you could impersonate a federal officer or narcotic agent?

A. She didn't say I could. She asked if I would.

Q. Shirley asked you if you would?

A. Yes, sir.

" Q. Nothing was said about credentials there, was there?

A. Not a word." (T. of R. Vol. 1, p. 131)
(Testimony of Wesley Doores)

"Q. Tell us anything that George Clayton said out there with reference to this doctor at Coeur d'Alene during that evening at any time.

A. Well, after dinner out there, we was talking, and George said he had a good score at Coeur d'Alene if he could get one of us to go on it, and Kelly asked what it was, and George Clayton ex-

plained that Shirley had been getting prescriptions from Dr. Teed at Coeur d'Alene, and he had been writing them in a fictitious name, and if some one would impersonate a federal man he could take the doc for some money, and he wanted me to go over and I wouldn't go, and Kelly asked what he thought the doc would come up with, and he told him, oh, \$800 or \$1000, somewhere (51) around there, I don't remember the exact amount, and Kelly asked him if he thought there would be any trouble, and George told him no, there wouldn't be any, and so Kelly agreed to go over there.

Q. What, if anything, was said by any of you as to how this transaction would be carried out and who said it, as you recall?

A. George went on to explain to Kelly, at the same time after Kelly consented to go, he would drive him over, and Shirley was to go up to the doc's office and Kelly would come in a few minutes later, and Shirley would see Kelly and tell the doc that was a federal man in the waiting room." (T. of R. Vol. 1, 140)

Manifestly either one or the other or both of these two key witnesses for the Government was testifying falsely. We realize that ordinarily conflicts in the testimony are for the jury, but in a case of this kind where the evidence discloses that appellant took no part in any of the overt acts except to allegedly receive a sum of money from his common-law wife after it had been extorted by the others, we believe the appellate court should scan with meticulous care the testimony of admitted accomplices, and if glaring contradictions are detected, as here, this court should hold as was stated

in *Orras v. U. S.*, 67 F. (2d) 463, “manifest injustice has been done to a defendant.”

Without the testimony of Kelly and Doores, the Government did not produce sufficient evidence to sustain the conviction, upon purely circumstantial evidence.

After the initial meeting and early the next morning, defendant Shirley Doores, and defendant Kelly, took a bus to Coeur d’Alene where they proceeded to carry out the scheme to extort money and narcotics from Dr. Teed upon threats of arrest and prosecution. Upon their return that afternoon, defendant Shirley Doores informed Kelly and Bunny Doores that she only received \$300.00. She gave Bunny \$80.00 and gave Kelly \$100.00; no mention being made of Clayton in the division of the spoils (T. of R. Vol. 1, p. 145).

It is significant that the money was divided approximately three ways between defendant Shirley Doores, defendant Kelly and Wesley Doores, appellant receiving no part of the proceeds. This point had particular significance to the trial court who asked the witness Wesley Doores (T. of R. Vol. 1, p. 146) “what he had done to cut in on this.”

Throughout the testimony of Wesley Doores, it is apparent that he is making a studied effort to interject into the case the name of appellant Clayton. Many facts and circumstances to which he testified under oath and

which should have been equally within the knowledge of defendant Kelly were not testified to by Kelly. The explanation of his animosity toward appellant is disclosed in the testimony of his brother, Robert Doores (T. of R. Vol. 2, pp. 471-8).

In his warped mind he believed that appellant had kept defendant Kelly and himself from getting an equal share with defendant Shirley Doores of the money extorted from Dr. Teed. He admitted receiving \$80.00 that he knew was extorted from Dr. Teed; he admitted impersonating Mike Sanders on the long distance telephone, and it is incomprehensible to anyone reading the record in this case why he also was not indicted.

The Government offered evidence as to deposits in appellant's bank account made during the time of the alleged conspiracy by which it sought to establish appellant received unusual sums of money, thereby giving rise to the suspicion that defendant Shirley Doores had given it to him.

The evidence shows that on February 4, 1944, appellant Clayton conveyed to Defendant Shirley Doores the real property in which the parties lived in consideration of a diamond ring valued at \$3,000.00 (Defendant's Exhibit "D") T. of R. Vol. 1, p. 84).

On the 8th day of May, 1944, Shirley Doores conveyed the same property by Quitclaim Deed to appellant Clay-

ton in consideration of \$3,000.00 (Defendant's Exhibit "E") (T. of R. Vol. 1, p. 86).

On May 16, 1944, appellant Clayton reconveyed the same property to Shirley Doores in consideration of \$3,000.00, and appellant testified that he received \$1,250.00 and was to receive the balance later which was prevented by the arrest of defendant Doores.

The bank deposits in appellant's name and the real estate transactions are as consistent with innocence as with guilt, and in the light of the explanation offered by appellant and the testimony of witness Deckelman (T. of R. Vol. 2, p. 396), and his mother as to money which she had loaned him (T. of R. Vol. 2, p. 465), the circumstantial evidence against appellant evaporates.

We respectfully submit that the facts were wholly insufficient to justify the Court in permitting the jury to speculate as to whether appellant was a member of the conspiracy charged in the indictment. We believe this Court will not allow a conviction to rest upon the feeble circumstances elicited supported as they were only by the unsatisfactory and contradictory testimony of defendant Kelly and Bunny Doores.

Specification of Error No. 6.

The District Court erred in further instructing the jury upon the subjects of conspiracy and circumstantial evidence at the request of plaintiff's attorney and over

the objection of defendant after the jury had been fully and completely instructed upon said subjects, thereby serving to emphasize in the jury's mind said instructions and, further, to weaken the instructions as given by the Court, to the prejudice of the defendant, which was as follows:

“Any discussion of the instructions?”

Mr. Connelly: Yes. Shall I state it in open court or at the bench?

The Court: Come up here.

(The following proceedings were then had at the Court's bench, without the hearing of the jury:)

Mr. Connelly: I listened very carefully, as carefully as I was able to, and it is not clear to me that in the Court's definition of an overt act necessary to constitute the crime, whether it might be the overt act of any of the defendants other than the defendant charged against in this case.

Mr. Smith: I think Your Honor has fully instructed on that point. The only exception I might take is to that very thing. They are very fine instructions.

The Court: They do not have to prove the overt act was by this defendant.

Mr. Smith: You have fully instructed on that.

Mr. Connelly: I feel that the last instruction on cir-

cumstantial evidence excludes all the direct testimony of the conspiracy, because each time you say 'you will find the defendant not guilty,' if the case is based upon circumstantial evidence, which in this case it is not. It is a combination of direct evidence and circumstantial evidence.

Mr. Smith: We feel that the instructions as given fully cover the case, and that to give any more at this time will simply emphasize certain matters and it will be to the prejudice of this defendant, and we object to the giving of any further instructions.

The Court: The exception will be allowed.

Mr. Smith: I have no exceptions to the instructions as given.

(Whereupon, the following proceedings were then had in the presence and hearing of the jury, to-wit:)

The Court: I do not want to over-emphasize any instruction that I have given. The instruction on conspiracy is rather complicated and difficult, as you realize, and in carrying out a certain suggestion made by Mr. Connelly, I am in no way emphasizing any particular point.

I will again call your attention to the fact that in the proof of overt acts the burden the Government has is to prove the body of the conspiracy beyond all reasonable doubt, as to the conspiracy showing the agreement,

which is the gist of the action, and to also show one of the overt acts alleged was committed in furtherance of the conspiracy.

That does not mean any particular one or more than one. They must prove one or more of the overt acts alleged was committed by one of the defendants in furtherance of the conspiracy.

Mr. Connelly also has the feeling that by instructing you upon circumstantial evidence that you might have the idea I was limiting your consideration of the case to circumstantial evidence.

The Government in this case is attempting to make its case both on the claim of direct evidence and circumstantial evidence. I have instructed you about your consideration and the tests you will use in testing the testimony of Wesley Doores and Edward Kelly, and also the general tests that you will use in passing upon the testimony of witnesses without any specific classification, the Government contending that under the testimony of Wesley Doores and Edward Kelly it has direct evidence of the defendant having participated, but it is also relying upon circumstantial evidence, and you will consider the instructions as to each, and in considering the question of circumstantial evidence you will follow the instruction I have given you and weigh such testimony according to the standards I have laid down for you in testing circumstantial evidence." (T. of R. p. 519)

The jury had already been fully instructed upon the general tests which they should employ in weighing the testimony of witnesses and had been particularly instructed upon the subjects of accomplice and prior conviction of crime (T. of R. Vol. 2, 502-4).

The effect of the additional instruction hereinbefore quoted, made at the suggestion of the District Attorney, served to forcibly direct the jury's attention to witnesses Wesley Doores and Edward Kelly by name. The court specifically mentioned that under the testimony of Wesley Doores and Edward Kelly, the Government contended it had direct evidence of the defendant having participated in the conspiracy. Such a charge coming as it did at the conclusion of the case served to give to the testimony of these witnesses undue prominence and to over-emphasize its importance in the case. Had the Court again referred to the fact that these witnesses were admitted accomplices, and their testimony for that reason should be weighed with caution, much of the over-emphasis would have been eliminated. However, the Court did not do this, but merely referred in a general way to the instructions already given concerning the tests to be used in testing the testimony of such witnesses.

Cases are numerous in which the Courts have refused to give requested instructions which would only tend to accentuate and give undue prominence to what,

after all, is but one of many circumstances in evidence, and the Circuit Court has repeatedly held that the refusal of such requests did not constitute error.

See

Bough v. U. S. (9th Circuit), 27 Fed. (2d) 257;

Marron v. U. S. (9th Circuit), 8 Fed. (2d) 251.

In this instance it is the Government who requested the Court to accentuate and emphasize the testimony of defendant Kelly and Wesley Doores.

We submit that it was error for the Court to accede to the District Attorney's request in this manner.

CONCLUSION

We respectfully submit the trial court should have granted appellant's motion for a directed verdict, and that in any event he is entitled to a new trial on account of the many errors to his prejudice which the record discloses.

Respectfully submitted,

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HAROLD M. GLEESON,

Attorneys for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MURRELL F. HAID,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

FILED

JUL 27 1946

PAUL P. O'BRIEN,
CLERK

No. 10978

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Western District of
Washington, Southern Division

July Term, 1944

No. 15668

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MURRELL F. HAID,

Defendant.

Violation: Section 76, Title 18, United States Code

INDICTMENT

United States of America,
Western District of Washington,
Southern Division—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn, and charged to inquire within and for the Southern Division of the Western District of Washington, upon their oaths present: [1*]

Count I.

That Murrell F. Haid, whose true name other than as given is to these grand jurors unknown, hereinafter called the defendant, on or about and between the dates of April 1, 1943, to December 31, 1943, at Olympia, Washington, then and there being, did then and there knowingly, wilfully, unlaw-

* Page numbering appearing at foot of page of original certified Transcript of Record.

fully and feloniously and with the intent then and there in him to defraud Mrs. Ruth McConkey and the United States of America, did falsely assume and pretend to be an officer and employee of the United States of America, acting under the authority thereof, and acting in such pretended character did demand and obtain from Mrs. Ruth McConkey things of value, to-wit, employment as an investigator, and sums of money, the exact amount of which being to these grand jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count II.

That Murrell F. Haid, whose name other than as herein given is to these grand jurors unknown, hereinafter called the defendant, on or about and during the months of January and February, 1944, the exact dates being to these grand jurors unknown, at Olympia, Washington, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously and with the intent then and there in him to defraud Gertrude Highmiller, and the United States of America, did falsely assume and [2] pretend to be an officer and employee of the United States of America, acting under the authority thereof, and did then and there take it upon himself to act as such officer and employee, in that

he called upon and interviewed the said Gertrude Highmiller; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count III.

That Murrell F. Haid, whose name other than as given herein is to these grand jurors unknown, hereinafter called the defendant, on or about and between the dates of April 1, 1943, and December 31, 1943, at Olympia, Washington, then and there being, did knowingly, wilfully, unlawfully and feloniously, and with the intent then and there in him to defraud Elizabeth Mathwig and Ralph Mathwig and the United States of America, did falsely assume and pretend to be an officer and employee of the United States of America acting under the authority thereof, to-wit, a Special Agent, Federal Bureau of Investigation, Department of Justice, and acting in such pretended character did then and there demand and obtain from the said Elizabeth Mathwig and Ralph Mathwig, certain things of value, to-wit, a quantity of drugs, the exact nature or description thereof being to the grand jurors unknown, and certain sums of money, the exact amount thereof being to these grand jurors unknown; contrary to the form of the statute in such case made and provided and against the peace and [3] dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count IV.

That Murrell F. Haid, whose name other than as given herein is to these grand jurors unknown, hereinafter called the defendant, on or about April 3, 1944, at Olympia, Washington, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously, and with the intent then and there in him to defraud C. H. Canfield and Laura Canfield, and the United States of America, did falsely assume and pretend to be an officer and employee of the United States of America acting under the authority thereof, to-wit, a Special Agent, Federal Bureau of Investigation, and acting in such pretended character did then and there demand and obtain from the said C. H. Canfield and Laura Canfield, money in the sum of \$100.00; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count V.

That Murrell F. Haid, whose true name other than as given is to these grand jurors unknown, hereinafter called the defendant, on or about August 17, 1943, at Woodland, Washington, then and there being, did then [4] and there knowingly, wilfully,

unlawfully and feloniously, and with the intent then and there in him to defraud Everett Stuart and the United States of America, did falsely assume and pretend to be an officer and employee of the United States of America, acting under the authority thereof, to-wit, a United States Marshal, and acting in such pretended character did then and there demand and obtain from the said Everett Stuart certain things of value, to-wit, an automobile tire and tube, without having or surrendering a ration certificate entitling him to obtain the same; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count VI.

That Murrell F. Haid, whose true name other than as herein given, is to these grand jurors unknown, hereinafter called the defendant, on or about and during the month of April, 1943, the exact time being to these grand jurors unknown, at or near Olympia, and within Thurston County, Washington, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously and with the intent then and there in him to defraud Mrs. Mary Lillibridge and the United States of America, did falsely assume and pretend to be an officer and employee of the United States of America, acting under the authority thereof, to-wit, a

Special Agent, Federal Bureau of Investigation, Department of Justice, and acting in such [5] pretended character did then and there demand and obtain from the said Mary Lillibridge certain things of value, to-wit, the rental and occupancy of a residence and the installation and use of a telephone therein; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Count VII.

That Murrell F. Haid, whose name other than as herein given is to these grand jurors unknown, hereinafter called the defendant, on or about and between June 1, 1944, and July 31, 1944, the exact time being to these grand jurors unknown, at Olympia, Washington, then and there being, did then and there knowingly, wilfully, unlawfully and feloniously and with the intent then and there in him to defraud S. Irene Nelson and the United States of America, did falsely assume and pretend to be an officer and employee of the United States of America, acting under the authority thereof, to-wit, a Special Agent, Federal Bureau of Investigation, Department of Justice, and did then and there take it upon himself to act as such officer and employee aforesaid, in that he ordered and purchased from the said S. Irene Nelson, a certain camera for use in his assumed and pretended

office and employment aforesaid; contrary to the form of the statute in such case [6] made and provided and against the peace and dignity of the United States of America.

(Signed) J. CHARLES DENNIS,
United States Attorney.

(Signed) HARRY SAGER,
Assistant United States At-
torney. [7]

Presented to the Court by the Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court Nov. 21, 1944. Millard P. Thomas, Clerk. By Gladys Chitty, Deputy. [8]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 29th day of November, 1944, the Honorable Charles H. Leavy, U. S. District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said court.

[Title of Cause.]

ARRAIGNMENT AND PLEA

Now on this 29th day of November, 1944, this cause comes on before the court for arraignment

and plea. Harry Sager, Asst. U. S. Attorney, represents the government and P. C. Kibbe and Bertil E. Johnson represent the defendant. Defendant in court and states his true name is Murrell F. Haid. On oral motion of Mr. Johnson, the court requires the government to furnish information to the defendant by Bill of Particulars as to what agency or office the defendant represented himself to be in Counts One and Two. The government is allowed an exception to the above ruling. Defendant is now arraigned and defendant and counsel waive reading of Indictment. Defendant now enters a plea of not guilty to Counts 1, 2, 3, 4, 5, 6 and 7 and cause is set for trial on January 2, 1945.

[Title of District Court and Cause.]

VERDICT

We, the jury empanelled in the above-entitled cause, find the defendant, Murrell F. Haid:

Not guilty as charged in Count I of the Indictment herein;

Not guilty as charged in Count II of the Indictment herein;

Is guilty as charged in Count III of the Indictment herein;

Is guilty as charged in Count IV of the Indictment herein;

Is guilty as charged in Count V of the Indictment herein;

Not guilty as charged in Count VI of the Indictment herein;

Not guilty as charged in Count VII of the Indictment herein.

Dated this 8th day of January, 1945.

/s/ CHESTER R. JORGENSEN,
Foreman.

[Endorsed]: Filed Jan. 8, 1945. [10]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant, Murrell F. Haid, and moves this Honorable Court on the records and files herein for an order granting him a new trial in the above-entitled action upon the following grounds:

I.

That there was not sufficient evidence of a violation of Section 76, Title 18 U. S. C. to authorize the submission to a jury of any issue contained in Count Five of the indictment and the Court erred in submitting said issue to the jury.

II.

That the Court erred in overruling defendant's motion for dismissal of said Count Five and for

a directed verdict of not guilty on Count Five, to all of which this defendant duly excepted.

III.

That the verdict of the jury on Count Five was contrary to the evidence.

IV.

That the Court erred in permitting in evidence, over the objection of this defendant that the same was incompetent calling for a conclusion and opinion and irrelevant and immaterial, the [11] testimony of the witness Everett Stuart to the effect that he believed that the defendant was a Special Agent of the Federal Bureau of Investigation or that he was a United States Marshal.

V.

That there was not sufficient evidence of violation of Section 76, Title 18 U. S. Code to authorize the submission to a jury of any issue contained in Count Four of the indictment and that the Court erred in submitting the issue to the jury.

VI.

That the Court erred in dismissing defendant's motion for dismissal of said Count, all of which defendant duly excepted.

VII.

That the verdict of the jury on Count Four was contrary to the evidence.

VIII.

That the Court erred in admitting in evidence, over the objection of the defendant that the same was incompetent, irrelevant and immaterial, the testimony of the witness, Laura Canfield, to the effect that she believed the defendant to be an agent of the F. B. I., same being the opinion of said witness, to all of which this defendant duly excepted.

IX.

That the Court erred in admitting in evidence, over the objection of this defendant, the testimony of the witness, Walter Canfield, to the effect that Laura Canfield had always called the defendant "the detective F. B. I." on the grounds that the same was not proper cross-examination and was incompetent as hearsay, irrelevant and immaterial to the issues of Count Four and to all of which this defendant duly excepted. [12]

X.

That there was not sufficient evidence of a violation of Section 76, Title 18 U. S. C. to authorize the submission to a jury of any issue contained in Count Three of the indictment and the Court erred in submitting said issue to the jury.

XI.

That the Court erred in overruling defendant's motion for dismissal of said Count Three and for a directed verdict of not guilty on Count Three, to all of which this defendant duly excepted.

XII.

That the verdict of the jury on Count Three was contrary to the evidence.

XIII.

That the Court erred in admitting in evidence, over the objection of the defendant that the testimony of the witnesses, Ralph Mathwig and Elizabeth Mathwig, to the effect that they believed the defendant to be an agent of the Federal Bureau of Investigation or an employee of the United States on the grounds that the same is incompetent, calling for an opinion and conclusion and upon the further ground that it was irrelevant and immaterial, to all of which this defendant duly excepted.

XIV.

That the Court erred in denying the motion of the defendant for a mistrial at the time that the juror, Mrs. Olga McCool, advised the Court that she was acquainted with one of the witnesses for the Government, she having theretofore and during her examination as to her qualifications to be a juror and prior to the time that the defendant had exhausted his pre-emptory [13] challenges, she had stated that she was not acquainted with any of the witnesses names were read or with any of the persons named in the indictment.

XV.

That the Court committed numerous errors in ruling upon the admissibility of evidence and in ruling upon the various motions made by this de-

fendant, all of which were highly prejudicial to this defendant and duly excepted by him.

BERTIL E. JOHNSON,
Attorney for Defendant.

Copy received this 11th day of January, 1945.

(Signed) HARRY SAGER,
Attorney for Plaintiff.
L. H. B.

[Endorsed]: Filed Jan. 11, 1945. [14]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 20th day of January, 1945, the Honorable Charles H. Leavy, U. S. District Judge, presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal Record of said Court:

[Title of Cause.]

Now on this 20th day of January, 1945, this cause comes on for hearing on motion for new trial. Harry Sager, Asst. U. S. Attorney, represents the government. Defendant in court represented by Counsel Bertil E. Johnson. Argument on motion for new trial by Mr. Johnson. The court denies motion for new trial and exception allowed. Defendant Comes forward for sentence.

Remarks by Mr. Johnson, the defendant and the court. Thereupon, it is the judgment of the court that the defendant having been found guilty by a jury, is guilty and is sentenced to a penal institution designated by the attorney general for the period of 18 months on each of Counts 3, 4 and 5, said sentences to run concurrently. The court fixes bond in the amount of \$3000.00 in case of appeal. Written Judgment and Sentence to be signed on Monday, January 22, 1945. [15]

United States District Court, Western District of
Washington, Southern Division

No. 15668

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MURRELL F. HAID,

Defendant.

JUDGMENT AND SENTENCE

Comes now, on this 22nd day of January, 1945, said defendant, Murrell F. Haid, into open court with his attorneys, Bertil E. Johnson and P. C. Kibbe, for sentence, after having been found guilty of the offense charged in Counts 3, 4 and 5 of the Indictment herein by verdict of a jury duly and regularly empaneled to hear the said cause, and being informed by the court of the charges herein

against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he having made a statement in his own behalf which was considered by the court,

Wherefore, by reason of the law and the premises, it is

Ordered and Adjudged by the court that the said defendant, upon the verdict of the jury is guilty as charged in Counts 3, 4 and 5 of the Indictment herein, and that he be committed to the custody of the Attorney General of the United States of America for imprisonment in such penal institution as the Attorney General of the United States or his authorized representative may by law designate for the period of Eighteen (18) months on each [16] of counts 3, 4 and 5 of the Indictment herein, said sentences to run concurrently with each other, and not consecutively.

And the said defendant is hereby remanded into the custody of the United States Marshal for this District for delivery to the Warden, Superintendent or other person in charge of such institution as the Attorney General of the United States may by law designate, for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done in Open Court this 22nd day of January, 1945.

(Signed) CHARLES H. LEAVY,
United States District Judge.

Presented by:

(Signed) GUY A. B. DOVELL,
Assistant United States At-
torney.

Violation of: Section 76, Title 18, United States Code.

[Endorsed]: Filed Jan. 22, 1945. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Murrell F. Haid, 417 Cushing Street, Post Office Box 462, Olympia, Washington.

Name and Address of Appellant's Attorney: Bertil E. Johnson, 505 Rust Building, Tacoma 2, Washington.

Offense: Violation of Section 76, Title 18, United States Code.

Date of Judgment: January 22, 1945.

Brief Description of Judgment: That the defendant is guilty of the crime of violation of Section 76, Title 18, United States Code as charged in Counts Three, Four and Five of the indict-

ment; that he be imprisoned in such penal institution as the Attorney General of the United States, or his representative, by law may designate for a period of eighteen (18) months on each of Counts Three, Four and Five of the indictment, said sentences to run concurrently with each [18] other and not consecutively.

Name of Prison Where Now Confined If Not on Bail:

On bail.

I, the above-named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

(Signed) MURRELL F. HAID.

Dated: January 26, 1945.

GROUND OF APPEAL:

I.

That there was not sufficient evidence of a violation of Section 76, Title 18 U. S. C. to authorize the submission to a jury of any issue contained in Count Five of the indictment and the Court erred in submitting said issue to the jury.

II.

That the Court erred in overruling defendant's motion for dismissal of said Count Five and for a directed verdict of not guilty on Count Five, to all of which this defendant duly excepted.

III.

That the verdict of the jury on Count Five was contrary to the evidence.

IV.

That the Court erred in permitting in evidence, over the objection of this defendant that the same was incompetent, calling for a conclusion and opinion, and irrelevant and immaterial, [19] the testimony of the witness, Everett Stuart, to the effect that he believed that the defendant was a Special Agent of the Federal Bureau of Investigation or that he was a United States Marshal.

V.

That there was not sufficient evidence of violation of Section 76, Title 18, U. S. Code to authorize the submission to a jury of any issue contained in Count Four of the indictment and that the Court erred in submitting the issue to the jury.

VI.

That the Court erred in dismissing defendant's motion for dismissal of said Count, all of which defendant duly excepted.

VII.

That the verdict of the jury on Count Four was contrary to the evidence.

VIII.

That the Court erred in admitting in evidence, over the objection of the defendant that the same was incompetent, irrelevant and immaterial, the

testimony of the witness, Laura Canfield, to the effect that she believed the defendant to be an agent of the F. B. I., same being the opinion of said witness, to all of which this defendant duly excepted.

IX.

That the Court erred in admitting in evidence, over the objection of this defendant, the testimony of the witness, Walter Canfield, to the effect that Laura Canfield had always called the defendant "the detective F. B. I." on the grounds that the same was not proper cross-examination and was incompetent as hearsay, irrelevant and immaterial to the issues of [20] Count Four and to all of which this defendant duly excepted.

X.

That there was not sufficient evidence of a violation of Section 76, Title 18 U. S. C. to authorize the submission to a jury of any issue contained in Count Three of the indictment and the Court erred in submitting said issue to the jury.

XI.

That the Court erred in overruling defendant's motion for dismissal of said Count Three and for a directed verdict of not guilty on Count Three, to all of which this defendant duly excepted.

XII.

That the verdict of the jury on Count Three was contrary to the evidence.

XIII.

That the Court erred in admitting in evidence, over the objection of the defendant that the testimony of the witnesses, Ralph Mathwig and Elizabeth Mathwig, to the effect that they believed the defendant to be an agent of the Federal Bureau of Investigation or an employee of the United States on the grounds that the same is incompetent, calling for an opinion and conclusion and upon the further ground that it was irrelevant and immaterial, to all of which this defendant duly excepted.

XIV.

That the Court erred in denying the motion of the defendant for a mistrial at the time that the juror, Mrs. Olga McCool, advised the Court that she was acquainted with one of the witnesses for the Government, she having theretofore and during her examination as to her qualifications to be a juror [21] and prior to the time that the defendant had exhausted his preemptory challenges, she had stated that she was not acquainted with any of the witnesses' names that were read or with any of the persons named in the indictment.

Copy received this 26th day of January, 1945.

(Signed) J. CHARLES DENNIS,
United States Attorney.

(Signed) HARRY SAGER,
Assistant United States
Attorney.

[Endorsed]: Filed Jan. 26, 1945. [22]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR LODGING,
SETTLEMENT AND FILING OF BILL OF
EXCEPTIONS AND ASSIGNMENT OF
ERRORS.

This matter having come on regularly for hearing before the Court upon a motion for an order fixing the time for lodging and filing of appellant's proposed bill of exceptions and filing of appellant's assignments of errors and the Court being fully advised, it is hereby

Ordered that the appellant shall serve upon the appellee the transcript of the testimony of the proceedings herein on or before the first day of May, 1945, and that appellant shall lodge with the Clerk of the above-entitled Court on or before the first day of August, 1945, his proposed bill of exceptions herein and the appellee shall file its proposed amendments to the proposed bill of exceptions on or before the 1st day of October, 1945. It is further

Ordered that the said bill of exceptions shall be settled before the above-entitled Court on or before the 10th day of October, 1945. It is further

Ordered that the appellant herein shall file his assignment of errors on or before the first day of August, 1945.

Done in Open Court this 19th day of February,
1945.

Presented by:

(Signed) BERTIL E. JOHNSON,
Attorney for Appellant.

/s/ CHARLES H. LEAVY,
United States District Judge.

Approved:

(Signed) HARRY SAGER,
Assistant United States Atty.

[Endorsed]: Filed Feb. 20, 1945. [23]

At a Stated Term, to-wit: The October Term, 1944, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-third day of July in the year of our Lord one thousand nine hundred and forty-five.

Present: Honorable Francis A. Garrecht, Circuit Judge, Presiding; Honorable William Healy, Circuit Judge; Honorable Homer T. Bone, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO LODGE PROPOSED BILL OF EXCEPTIONS, ETC.

Upon consideration of the stipulation of counsel

for the respective parties, filed July 21, 1945, and good cause therefor appearing,

It is Ordered that the time to lodge the proposed Bill of Exceptions and to file Assignments of Error be extended to September 1, 1945, and that the time to lodge Amendments thereto and to settle said Bill of Exceptions be extended to October 15, 1945.

(Reverse Side)

I Hereby Certify that the foregoing is a full, true and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23d day of July, 1945.

/s/ PAUL P. O'BRIEN,

Clerk, U. S. District Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed July 25, 1945. [24]

At a Stated Term, to-wit: The October Term, 1944, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Friday, the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and forty-five.

Present: Honorable Clifton Mathews, Circuit Judge Presiding; Honorable William Healy, Circuit Judge; Honorable Homer T. Bone, Circuit Judge.

[Title of Cause.]

ORDER EXTENDING TIME TO PROPOSE
AMENDMENTS TO BILL OF EXCEP-
TIONS, AND TO SETTLE BILL OF EX-
CEPTIONS.

Upon consideration of the stipulation of counsel for respective parties, and good cause therefor appearing,

It Is Ordered that the time to lodge proposed amendments to the bill of exceptions, and to have said bill of exceptions settled and filed be, and hereby is extended to and including November 15, 1945.

(Reverse Side)

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 28th day of Sept., 1945.

/s/ PAUL P. O'BRIEN,
Clerk, U. S. Circuit Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed Oct. 3, 1945. [25]

[Title of District Court and Cause.]

PRAECIPE FOR PORTIONS OF RECORD TO
BE INCORPORATED INTO TRANSCRIPT
OF RECORD ON APPEAL.

To the Clerk of the Above-Entitled Court:

You are hereby requested to prepare the following portions of the record and to incorporate such portions into the transcript on appeal in the above-entitled cause, to-wit:

1. Indictment.

2. Your minutes reflecting the arraignment and plea of not guilty to all counts of the indictment by the defendant, Murrell F. Haid, on November 29, 1944.

3. Your docket entry of January 8, 1945, reflecting the verdict of the jury and the trial of the defendant in the above-entitled action.

4. Defendant-Appellant's motion for new trial filed January 11, 1945.

5. Your complete minute entries showing the denial of the defendant's motion for new trial.

6. Judgment and sentence.

7. Notice of appeal of defendant Haid filed January 26, 1945.

8. Order dated February 19, 1945, extending the time for filing proposed Bill of Exceptions and Assignment of Errors. [26]

9. All orders of the Circuit Court of Appeals

filed with you which extended the time for lodging, filing and settling appellant's proposed Bill of Exceptions and for filing Assignment of Errors.

10. Assignment of Errors.

11. This praecipe.

(Signed) BERTIL E. JOHNSON,
Attorney for Appellant.

Copy received this 27th day of December, 1945.

(Signed) J. CHARLES DENNIS,
United States Attorney.

(Signed) By: HARRY SAGER,
Assistant United States
Attorney.

[Endorsed]: Filed Dec. 27, 1945. [27]

[Title of District Court and Cause.]

PRAECIPE FOR EXHIBITS TO BE INCLUDED IN THE TRANSCRIPT OF RECORD OF APPEAL.

To the Clerk of the Above-Entitled Court:

You are hereby requested to include the following designated exhibits in the transcript on appeal in the above-entitled cause, to-wit:

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 7, 8, 11, 14, 15, 16, 18, 19, 22, 23, 31 and 32.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ HARRY SAGER,
Assistant United States
Attorney.

Copy received this 5th day of January, 1946.

BERTIL E. JOHNSON, EMC,
Attorney for Defendant-
Appellant.

[Endorsed]: Filed Jan. 5, 1946. [28]

[Title of District Court and Cause.]

ORDER

This matter coming before the Court upon the Stipulation of the parties hereto in reference to exhibits being forwarded to the Circuit Court of Appeals for the Ninth Circuit; and, it appearing to the Court that the parties hereto have stipulated that certain exhibits should be forwarded to the Circuit Court of Appeals for the Ninth Circuit and be made a part of the transcript of record on appeal; Now, therefore, it is hereby

Ordered that the Clerk of this Court transmit as a part of the record the original exhibits to the Circuit Court of Appeals for the Ninth Circuit, to-wit:

Plaintiff's Exhibits 1 to 8, inclusive, 11, 14 to 19, inclusive, 22, 23, 31 and 32,

and

Defendants Exhibits A-1, A-2, A-4, A-10, A-12, A-13, A-16, A-17, A-18, A-23, A-24, A-25, A-26, A-27, and A-31.

Done in Open Court this 21st day of January, 1946.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

/s/ BERTIL E. JOHNSON,
Attorney for Defendant.

[Endorsed]: Filed Jan. 21, 1946. [29]

[Title of District Court and Cause.]

TRANSCRIPT OF DOCKET ENTRIES

1944.

Nov. 21 Filed Indictment.

Nov. 21 Ent. order fix. bond \$1000 (Bond in #15650 to apply).

No. 29 Deft. in court with counsel. Ent. order, on oral motion deft., Govt. to furnish Bill of Particulars re Cts. 1 & 2; exception allowed.

Ent. arr. & plea "Not Guilty," all 7 cts. Set for trial Jan. 2.

Dec. 4 Filed Bill of Particulars.

Dec. 7 Filed Praecipe, US Issued 15 subp.

1945.

- Jan. 2 Deft. in court with counsel. Ent. record trial commenced—jury—Judge Leavy presiding.
- Jan. 3 Ent. record trial resumed.
- Jan. 4 Ent. record trial resumed.
- Jan. 5 Ent. record trial resumed.
- Jan. 6 Ent. record trial resumed.
- Jan. 8 Ent. record trial resumed.
- Filed Verdict (at 11:40 PM): “Guilty Cts. 3, 4 & 5”—“Not Guilty Cts. 1, 2, 6 & 7).
- Ent. order deft. enlarged present bail pend. Motion New Trial.
- Jan. 11 Filed Motion for New Trial.
- Jan. 12 Motion New Trial noted for Jan. 15, 1:30 PM.
- Jan. 12 Filed Notice re hear. Motion New Trial.
- Jan. 13 Filed Stip. & Order ret. Exh. A-20 (FBI badge) and receipt therefor.
- Jan. 15 Motion for New Trial passed to Jan. 20.
- Jan. 20 Deft. in court with counsel.
- Ent. order Motion New Trial denied; exception allowed;
- Ent. Judgm. and Sentence: 18 mos. US Pen. (concur. on Cts. 3, 4 & 5); written J & S Jan. 22; appeal bond fixed at \$3000.

1945

- Jan. 22 Deft. in court with counsel.
 Filed Judgm. and Sentence (18 mos. US
 Pen. (concur on Cts. 3, 4 & 5).
 Ent. order appeal bond reduced to \$2000.
 Filed Bond on Appeal (\$2000 cash).
- Jan. 26 Filed Notice of Appeal.
 Copy Notice of Appeal & statement of
 docket entries transmitted to Clerk, C.
 C. A.; notice given Judge Leavy of No-
 tice of Appeal.
- Feb. 20 Filed Order extend. time to lodge Bill
 of Ex. (to 10/1/45) & to settle & file Bill
 of Ex. & Assign. Errors (to 10/10/45).
- July 25 Filed cert. copy Order of CCA extend.
 time to 9/1/45 to lodge proposed Bill of
 Ex. & file Assign. Errors, and to 10/15/45
 to lodge Amendments & settle Bill. [30]
- Sept. 1 Filed Assign. of Errors.
 Lodged Appellant's proposed Bill of Ex-
 ceptions.
- Oct. 3 Filed cert. cop. Order of CCA extend.
 time to Nov. 15 to settle Bill of Ex.
- Nov. 2 Lodged Appellee's proposed Am. to Bill
 of Ex.
- Nov. 15 Ent. record hear. re settle. Bill of Ex.
 Filed & ent. Judge's Certificate re allowed
 Bill of Except. (consist. of Appellant's
 proposed Bill (1 vol.) and Appellee's pro-
 posed Bill (1 vol.).
 Filed Bill of Exceptions (as settled; 2
 vol. above named).

1945

Dec. 27 Filed Praeipe for Record on Appeal.

1946.

Jan. 5 Filed Praeipe US for inclus. of exhibits
in appeal rec.

Jan. 8 Filed Affid. deft.

Jan. 8 Filed Order permit. deft. leave jurisdiction
(to 1/24/46).

Jan. 21 Filed Stip. to transmit orig. exh.

Jan. 21 Filed Order transmit. orig. exhs. to CCA.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 33, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause No. 15668, United States of America, Plaintiff, vs. Murrell F. Haid, Defendant, as required by Praeipe of Defendant-Appellee, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of the United States District Court for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original Bill of Ex-

ceptions, as certified by the Judge of the said District Court, and the original Assignment of Errors herein, are transmitted herewith.

I do further certify that pursuant to Order of the District Court the original exhibits, being Plaintiff's Exhibits numbered 1 to 8, inclusive, 11, 14 to 19, inclusive, 22, 23, 31 and 32, and Defendant's Exhibits numbered A-1, A-2, A-4, A-10, A-12, A-13, A-16, A-17, A-18, A-23, A-24, A-25, A-26, A-27, and A-31, are transmitted herewith. [32]

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred by me on behalf of the Defendant-Appellant herein in the preparation and certification of the said Transcript of the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Appeal fee	\$ 5.00
To Clerk's fee for preparing and certifying Transcript of Record.....	7.20
	<hr/>
Total	\$12.20

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, in the Western District of Washington, this 28th day of January, 1946.

[Seal] MILLARD P. THOMAS,
Clerk.

By EDGAR SCOFIELD,
Deputy. [33]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered, That on to-wit this 2nd day of January, 1945, at the hour of 10:00 a. m., the above-entitled cause came on for hearing before the Honorable Charles H. Leavy, one of the Judges of the above-entitled court, at the United States Court House in Tacoma, Washington.

The plaintiff appeared by Harry Sager, Assistant United States Attorney.

The defendant appeared in person and by his attorneys, Bertil E. Johnson and P. C. Kibbe.

All parties having signified their readiness to proceed to trial, a jury was duly empaneled and sworn, and thereafter an opening statement for the Government was made by Mr. Sager.

Whereupon the following proceedings were had and testimony given, to-wit: [1*]

RUTH McCONKEY,

a witness called on behalf of the Plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Ruth McConkey. I live at Olympia, at 1202 West 10th. I have a brother, Captain James Mathwig. He is a doctor in the Armed

* Page numbering appearing at foot of page of original Reporter's Transcript.

(Testimony of Ruth McConkey.)

Forces and has been in service since April before Pearl Harbor. He is in the Medical Corps. In the first part of 1943 he was still at Guadalcanal. He is married and at that time his family was living in a little house next to my mother out where they are building the hospital at Tumwater. That is a little west of Olympia. He has two little girls. They were 4 and 5 then and are 5 and 6 now.

I knew Mr. Haid about that time. My brother wrote a letter to me. I undertook to place the children in a home until he came back. That was all he asked. I went to the Prosecutor Lynch first and he said to get some evidence and present it in court and they would take definite action. In the meantime Mr. Lynch went into the Navy, I believe, and all of this was turned over to Levi Johnson. He is the assistant, or acting Prosecuting Attorney of Olympia, and when I told him all the evidence we had and showed all the checks and letters and things he said there was a new detective in town and for me to hire him and have him get the evidence. That is what I did. I went to the police station and they gave me Mr. Haid's card. I think I 'phoned him and we made an appointment and he came out at ten. That was in April and I believe it was the 23rd of April in forty-three. He came out almost immediately when I called him. I outlined to him over the telephone briefly the purpose of my call and we did not wish to discuss it over the telephone so he came to the house. At the house I told him just what I did, about the Prosecuting

(Testimony of Ruth McConkey.)

attorney—all the evidence and my brother's letters and all those other things. He said he would get the evidence—what I showed him he figured I had enough to place the children in a home and that he would help me.

We talked for about an hour and then through that conversation he said—well, he sort of went back to his—why he was here and he just came here and remarked about the weather and said he came from Los Angeles. He said he was sent up here by the Government. He said he wanted to locate in Puyallup first but it was too far from Fort Lewis and he was working as a sort—what I would say, an under-cover man, that is the way he put it himself. He said, "Well, you know, Mrs. McConkey, there is a war on." He said that Fort Lewis has these great big contracts and things and that he was hired by the Government to over-see it. That is what he said to me at the house that morning. As to the nature of the work that he was doing he just said that it was—oh, like any other thing—that there was—well, just like crooked work. Well, I took his word. He showed me a gun and he showed me his badges and he showed me a black billfold with a lot of identifications but I couldn't tell you what was on it because I was so anxious at this time about the case I was not paying attention to it.

I would not say that Plaintiff's Identification 3 was the badge. It is darker colored and is tinny looking. The badge he showed me is smaller than

(Testimony of Ruth McConkey.)

this. It has the Eagle on it but I would say the Eagle is more pronounced. It said something on it about "Investigation" and that is all I remember, and it was written around the top. It was not like that around the bottom. He was wearing his gun and took it out. He just handled it. He did not hand it to me. It was a black gun quite long. He had handcuffs. He always wore them. He just said that he was sent up from Los Angeles. That was all he said to me. He said his work here was to be more or less at Fort Lewis. He said he worked until noon. His time at Fort Lewis took him until noon and he always came right after lunch and I asked him if he could work for me and charge \$20.00 a day how he expected to work for them and me too and he said the type of woman Margaret was—she evidently sleeps all day and works at night. Margaret is the wife of Captain Mathwig. She was the person he was supposed to get information about. When I asked him how he was going to be able to work for me he said just that he would work Sundays and evenings. Later on he wore the Army clothes he was required to wear. He said that it was Government regulations. The Army clothes he wore were not like my brother's, but he is a Captain. They are gray. They are more of a pinkish cast. He had a Government shirt with the short jacket like the bus drivers wear. I think he had four or six pairs of those.

During our first conversation Mr. Haid said as to the connection between his detective work and

(Testimony of Ruth McConkey.)

his government work, that his detective work was merely a cover-up for his real reason to be here. The real reason for his being here was that he was sent here to Fort Lewis to over-see Fort Lewis, his Government work. As to the nature or character of the work he was doing at Fort Lewis for the Government, he just said that he was to over-see large contracts like there was—well, big business—an over-seer. As to whether or not he could disclose his Government work he then said that it was confidential in war time. He just said that it was confidential. He showed me his credentials. They had a blue card. And then he had a card with a picture on it. That is all. I couldn't tell you what it said on it. He said he had come here from Los Angeles and he was sent here by the Government. On this first day I made arrangements for his employment. I was to pay him \$20.00 a day. He said it would take from six to eight days to take care of it. He said he would just get evidence. He was to get evidence in this matter with respect to my brother's children. He would submit the evidence to me from time to time. This employment continued until August 17th. During this time I would see him about every day, every afternoon or every evening. On the first occasion, I am not sure of the amount, I think I paid him either Fifty Dollars or a Hundred. There are two checks I notice they have "for retainment fee" and I am positive it was Fifty Dollars the first time and in a few days he was back and I gave him a check for a Hundred.

(Testimony of Ruth McConkey.)

When he called on me the first time he had a dark suit with an overcoat and a dark hat but later on, I would say about two weeks later he had the Army pinks on. He had on other parts of the uniform. He wore that frequently. He also carried handcuffs. He had his belt and he had a gun on one side and his handcuffs on the other. He showed me his gun on more than one occasion and after he had worked for me about two weeks he said he had to have his gun cut down for Government regulations and he had that done at Fort Lewis because Olympia was either too slow or he could go right into Fort Lewis. I just naturally didn't question him. He said the barrel was being cut down in length, to two-inch barrel or something like that.

On the various times I saw him he would mention Fort Lewis. He had either just come from Fort Lewis in a kind of a brisk way, in a hurry, you know. He did this a number of times, right in the beginning, especially. During the first conversations he said that in case he had to he could put a man behind the telephone and listen to telephone conversations to obtain evidence—we would need.

He finally recovered the children about August 17. At that time they were in Portland, Oregon. I went down there with him. On the way down, right out of Chehalis we blew out a tire and his jack would not work so he threw it in a ditch and he tried to stop a car and it would not stop and he

(Testimony of Ruth McConkey.)

pulled out a badge and it was a round badge which fitted in the palm of his hand and he said "that ought to do it" and he did stop a car and they let us have a jack. To stop the car he just flashed the badge on the car.

We obtained the children in Portland and brought them back the same night. Mr. and Mrs. Haid and myself were the only ones on the trip. He gave me a blue card and I went as a welfare worker. I went as a welfare worker at Mr. Haid's suggestion. He gave me this before we started. I don't remember why it was given to me—just that I went as a welfare worker. I was not engaged in welfare work. He gave me this blue card "This certifies" to indicate that I was a welfare worker. He signed it. I gave it back to him when we got back to Olympia. He asked for it.

On our way back from Portland we had another blow out. He did not stop. We drove on the tire until we came to a gas station at Woodland. Mr. Haid got out and went in and he talked a while and just came out and he said he did not have any money with him, evidently, because he borrowed \$20.00 from me to pay for the tire and then he said the tire was \$22.75 but I stayed out in the car as did Mrs. Haid. We did not hear the conversation. He got a tire and it was put on the car there. Plaintiff's Identification 4 is a card similar to the one he gave me when we started from Olympia. This is a blank card. The one he gave me was filled in "This is to Certify that Mrs. Ruth Mc-

(Testimony of Ruth McConkey.)

Conkey is an operator of this office and any courtesies extended to her will be appreciated" and it was signed by Mr. Haid. There was something on the card to say that I went as a welfare worker. That was written on the card in pen.

(Card admitted as Plaintiff's Exhibit 4.)

There was another incident on that trip. That is we were stopped by the police for speeding at Chehalis. Just like before I sat in the car but when he came back to the car he said "I had to do some tall talking to get out of that one." I don't know whether on that occasion he showed his billfold or his badge. I believe it was his badge, though. He did that just before he stepped out of the car.

I didn't get a statement from Mr. Haid for the amount I have paid him but my brother did. I asked him for a statement for the purpose of making up my brother's income tax and he gave me one. It is Plaintiff's Identification No. 5. This statement is in his handwriting. The upper portion of that statement represents the amount I paid him on this case. The other items are payments that he made for me to others. In carrying on this business with Mr. Haid for my brother I had a power of attorney and the money I paid Mr. Haid's was my brother's money. I did not pay him all at one time. I paid about, I would say it would be \$50.00 or something like that, whenever it was, because it amounted to twelve hundred and some dollars in three months. He would submit bills or statements to me from time to time. I paid by cash and checks,

(Testimony of Ruth McConkey.)

mostly checks. They were on my brother's account.

(Statement Admitted as Plaintiff's Exhibit 5.)

The first part of this exhibit says "Investigative matter for Captain James E. Mathwig, M.D., from May 23, 1943, to August 18, 1943. Total amount paid, expenses and salaries attached to investigation, \$1225.64" and then it says "Plus Margaret's debts in and around Olympia, Washington, \$500." This item of \$500 was not paid to Mr. Haid. Then there are other items for attorney's fees which I paid. Those other items total Eight Hundred dollars and they had nothing to do with the total of \$1225.65. The \$1225.64 is what I paid Mr. Haid, which I never questioned.

In addition to this money which I paid Mr. Haid from Capt. Mathwig's account, he borrowed from me a Hundred Dollars to the 10th of September. He said his Government check was slow and he wanted Two Hundred and I did not have it so I let him have a Hundred and in addition to this Hundred he came over and borrowed some more. He borrowed Twenty Dollars the first time and then he came over and borrowed Fifteen and then he borrowed Five and then I let him have Five on an electric range, and then he borrowed Forty. Plaintiff's Identification No. Six is the check of September 10th. I didn't have it at the time so I wrote it on my brother's account and Mr. Haid promised he would pay it back in thirty days. He didn't pay

(Testimony of Ruth McConkey.)

it back in thirty days and he wanted to know if I wanted a note and I said No, if your word is no good your check is no good. The check has never been paid. He never paid back the Hundred. He never paid any of the other sums I advanced.

(Check admitted as Plaintiff's Exhibit No. 6.)

Exhibit No. 6 is drawn upon my brother's account. I subsequently repaid it to my brother.

The employment of Mr. Haid with respect to the two children ceased on August 17 when we returned them. I didn't get a statement from Mr. Haid following that. We don't owe him anything. It was all paid up—up to, I imagine it must have been three days later that we paid him the last Hundred and Eighty. With respect to the Hundred Dollars I had a conversation with Mr. Haid about it about February 14, 1944. This conversation was at his house. He and Mrs. Haid were present, and my brother. And I had to show my brother what I did with his money so I took him over to Mr. and Mrs. Haid and asked Mr. Haid for the Hundred dollars and he said he didn't have it, that the Government was slow in paying him. I said, how can the Government be slow when you have to live, pay rent and everything, and he just didn't have it.

During this time Mr. Haid didn't have an awful lot to say about the hospital on my mother's place, just that with his connections he thought he could get it going. Mother offered it free, you know. He said that with his Government connections—that is

(Testimony of Ruth McConkey.)

all he would say. We didn't discuss it very much. He said concerning my brother and in connection with the hospital if we could bring my brother back—that if I would pay for 'phone calls and everything that with his connections he could bring him back and have him run the hospital. During this time the matter of these drugs came up. Mr. Haid did not say much about them only that he had buried them. That he had taken them and had them analyzed and buried. He buried them, that is all—Mr. Haid went out to get the drugs and got that statement from Altman and that is where the whole thing started. I think that is when he went out to mother's and got the box of drugs to see if there was dope in there. Altman was an X-Ray Technician for Fort Lewis. He is the man in question. After getting this statement from Mr. Altman, Mr. Haid told him that they were old drugs and that he took them out and buried them. That was the end of that. I didn't hear any more of it.

At one time he said something to me about accounting for his time. Just said that he had to account to the Government for his hours. At one time I went over to Mr. Haid's for the records on this matter. That was some time in November of '43. I asked him for the complete file, it was all paid for and everything and he said the papers belonged to the Government. He said, no one gets those, they belong to the Government. So I went to Mr. Trullinger the next day. After seeing Mr.

(Testimony of Ruth McConkey.)

Trullinger I again went back to see Mr. Haid and I didn't get them. He did not give them to me. He didn't say much about anything the second time and I thought I would just not get him mad or anything and let it go till my brother came home.

Q. Now, Mrs. McConkey, did you believe that he was a Government employee?

Mr. Johnson: Just a minute. Object to that. That is not the criterion of the charge herein laid. It is a question of representation, what representation was made.

The Court: I think in a case of this nature the question is proper and you may answer. It is the ultimate fact for this jury to say whether he did or did not represent himself as such.

Mr. Johnson: Her believing is not a criterion.

The Court: It is not conclusive on the jury whether he was or was not. It is a question of whether or not——

Mr. Johnson: I take exception on the Court's ruling of the matter. I disagree with the Court.

The Court: She may answer.

A. Yes, I would say I did.

Q. Did your belief that he was a Government man in any way influence your transactions?

Mr. Johnson: Same objection.

The Court: Objection overruled.

Mr. Johnson: Exception.

A. May I answer?

Q. Yes, you may answer. A. Yes.

(Testimony of Ruth McConkey.)

Cross-Examination

By Mr. Johnson:

I hired him as a private detective. That was the entire basis on which I hired him. I didn't hire him as an officer of the Government. My whole reason for hiring him was to represent me as a private detective to secure information for me.

My son-in-law worked for Mr. Haid. I believe it was in September and October. I didn't ask Mr. Haid to hire him as a private detective. I never discussed his employment with Mr. Haid. I knew that he was working as an operative for Mr. Haid. They were pretty secretive about their work. I don't know whether my son-in-law was paid by the day or the case. I didn't discuss with Mr. Haid that my son-in-law had no experience in investigative work and that I wanted him to get some experience.

We visited back and forth with the Haid's quite considerable, played cards with them. My brother's wife's name is Margaret. We first started on the investigation of the care of the children when my brother sent me a letter, I believe it was in October of '42. In January I went to Mr. Lynch, he was the prosecuting attorney of Thurston County, and then I talked to Mr. Levi Johnson, who is now the Acting Prosecuting Attorney, and Mr. Johnson told me that I had to have some evidence in order to take those children away from their mother and then I discussed with him the secur-

(Testimony of Ruth McConkey.)

ing of Mr. Haid. Mr. Johnson told me at that time that Mr. Haid was a private detective and that his work consisted entirely as a private detective and investigator. I understood that before I saw Mr. Haid. It was on the card. It was advertised in the paper. Defendant's Identification A-1 is the card. It is the card that Mr. Haid gave me the first day he came to my place.

(Card admitted as Defendant's Exhibit A-1.)

Defendant's Exhibit A-1 is a card similar to the one he gave me. It is not the exact card but it is just like it. He advertised in the newspaper in Olympia and I had seen the ads prior to the time I saw Mr. Haid. The ad set forth that he was a private detective and investigator. I have seen the ads as contained in defendant's identification A-2, being two newspapers. I did not see them prior to the time I employed Mr. Haid. I have seen advertisements like it since. I didn't notice them before I employed him. I didn't get him that way. I went to the police station. I never told Mr. Levi Johnson, when I went to see him that I had seen Mr. Haid's advertisement in the newspaper. I don't know how soon after I saw Mr. Haid, or how long after I saw Mr. Haid that I saw those advertisements in the newspaper.

(Newspaper admitted as Defendant's Exhibit A-2.)

When I talked to Levi Johnson he didn't tell me that Mr. Haid had done some work for his office.

(Testimony of Ruth McConkey.)

At no time, either on April 23rd or thereafter up to December, 1943, did Mr. Johnson make any statement to me to the effect that Mr. Haid had done some work for his office. Mr. Johnson didn't tell me that Mr. Haid had a good reputation and he would do a good job for me.

I am not complaining on the job he did. I never questioned the service for which he charged me. I would still have employed him if he had not told me about being connected with the Government. That was not the thing that determined my employment of Mr. Haid. I was hiring a private detective. That was solely the reason I was hiring him, but being a Government man gave him more prestige. If there had been no statement about him being a Government man I would still have hired him as a private detective.

When he came to see me the first day he came about 10 o'clock in the morning. It would be hard to recall what other mornings he came to see me. I don't know of ever being in his office before noon during the period of April 23 to August 17. I presume I have called him in the morning on a number of occasions. I couldn't say how many times I called him on the telephone before 12 o'clock. Most of the conversations were at night. I couldn't say as to the morning visits or the morning telephone calls I had with him during that period. He came to the house at noon. I must have called him sometimes in the morning but I haven't any recollection how often. I would say 8 times or so.

(Testimony of Ruth McConkey.)

I imagine it would be more than two occasions. I have never seen Mr. Haid in Levi Johnson's office. The attorney I had to represent me, or represent my brother in this matter was Mr. Armstrong, the Attorney General, and he resigned and then I had Mr. Trullinger. I never discussed this matter with Mr. Haid in Mr. Armstrong's office.

I loaned my son-in-law some money when he worked for Mr. Haid because he was out on a case. I knew he had a gun. I knew he had to have the gun because he was working for this detective agency. I knew he had taken a course back in Chicago by correspondence. Mr. Haid sent his name in and got \$5.00 for it.

After I talked to Mr. Levi Johnson about the private detective I called Mr. Haid. I had gone down to the police station and got his card. I had his 'phone number. When I went to the police station I saw a sergeant. I asked him if there was a private detective in town and he said yes. He told me Mr. Haid was a private detective. He reached over and got the card and gave it to me and after that I called Mr. Haid. I tried to get him a few mornings and didn't get him.

When I got him he was not at Fort Lewis. When he came to the house he was alone. He showed me his badge at that time but not right away. It was in a separate container, in a little round leather. I have never seen Defendant's Identification A-3 or one like it. The one I saw was black. In his credentials he had a card similar to Plaintiff's

(Testimony of Ruth McConkey.)

Identification 4 with him name on it. There was also one with a picture in it.

When he came out to my house that morning he told me that he was a private detective and investigator. He told me that he had come from Los Angeles. He didn't tell me that he had had a private detective agency in Texas. I didn't know that. He did not tell me that he worked for the Navy. He said he worked for the Government. He never told me that he worked for the Navy or that he worked for a defense plant that was operated for the Navy down in Los Angeles. He did not tell me what he had been doing prior to his going to Los Angeles. On this first visit he told me that he was working for the Government. He did not say definitely what job he was doing for the Government. I was so wrapped up in hiring him for the children, and he said more or less he was an under-cover man. Exactly as he said it, for Fort Lewis. He said there were big contracts there and he was an over-seer. Not an over-seer. He just said he was a Government man watching big contracts. That is all. He said they got these big orders and shipments and the Government had to have a man oversee them. He said he worked mornings at Fort Lewis. He did not say what hour he got through there. He said mostly noon. He did not tell me how long he had been employed in that work at Fort Lewis. At that first conversation he was there about one and a half hours. The first

(Testimony of Ruth McConkey.)

three quarters hour was about securing evidence concerning the children.

I imagine I hired him about that time but I can't remember when I gave him the money. Whether he went out and said "Mrs. Haid is in the car" and came in. It seems to me I paid him then. I didn't hire him when he first came to my place. I explained to him the whole thing what I wished him to do, then I hired him. I didn't hire him prior to the time that he told me anything about the Government. All of it just sort of balanced in. I just told him and he said he would get the evidence for me and it would take six to eight days. I think I hired him before he said anything about being employed by the Government. I do not know whether I did or did not tell him I wanted to hire him after I had explained what I wanted to know and what information was required. I did not come right out and tell him and say "Okey I will hire you." I don't know. It just wasn't that way. One thing led from the weather and the next thing he was telling me he came from Los Angeles and it was more or less run together there. I hired him before he left, that is all I can say.

I saw him a great many times. I wouldn't say every day. I would say I saw him every other day and 'phoned him every day. I talked to him on the 'phone every night. He called me several times at night and on some days. I saw him several times a day. He made written reports to me from time to time. He sent a copy of them to Mr. Levi John-

(Testimony of Ruth McConkey.)

son and to Ralph Armstrong and I believe to my brother. And I believe to Mr. Trullinger when he represented us. I believe that I have substantially all the reports he sent me. They are home. I can bring them here. From time to time he sent me statements of what I owed him. I have turned them over to Mr. Wilson, I believe.

I knew Mr. Haid about half an hour before he showed me his gun. He showed it to me the first day. He also showed me the handcuffs that first day. He sold my son-in-law a pair of handcuffs he found in a pawn shop. He didn't sell the original pair that he had. I cannot say definitely I saw the handcuffs the first day but I am definite about seeing the gun.

There was just one trip by Mr. Haid to Portland that I was on. We were going to take my car but instead we took Mr. Haid's. He suggested it. Before we went there had been a hearing before the court in Olympia concerning the custody of the children and the court had entered an order in reference to the custody of these children.

I didn't ask my Haid for this blue card at the time I went down there. I didn't say to Mr. Haid that I wanted it so that we would have no difficulty with my sister-in-law down in Portland. I don't know why the card was given me because I was supposed to get out of the car two blocks ahead and they were to go to the house. There was no reason for me getting a card and I don't know why the card was handed to me. We got the chil-

(Testimony of Ruth McConkey.)

dren at Portland. We didn't go to the police station first. He 'phoned the police in Portland from here before we left and they couldn't give us any help because we were out of Oregon state.

On the way back when we stopped at Mr. Stuart's station at Woodland there was some talk about payment of this tire. I was not going to pay half of the tire and Mr. Haid the other half. I don't know of any statement being rendered to that effect by Mr. Haid. I loaned him \$20.00 for a tire. He did not give me credit for this \$20.00 on his bill.

Defendant's Identification A-6 is one of the statements that Mr. Haid gave me. There were two tires blown, not one. He charged me for two. The statement shows "Half expense of Tire, \$12.00" and near the top it shows "Credit by Cash \$20.00." I am not sure that that credit was the \$20.00 which I gave him at the time we came up from Portland.

(Statement admitted as Defendant's Exhibit A-6.)

We made the trip to Portland on August 17 but I am not sure that the \$20.00 credit is for the \$20.00 I gave him at Woodland. Defendant's Identification No. A-4 is a check for \$30.00 with my endorsement. It is the \$30.00 that Ellsworth gave him for the gun. The check was given to me by my son-in-law.

(Check admitted as Defendant's Exhibit A-4.)

The children were 4 and 5 when brought back. They were delivered to Mrs. Nordstrom, the wel-

(Testimony of Ruth McConkey.)

fare executive in Thurston County. I did not see much of Mr. Haid after August 17.

I did not have any difficulty with Mr. Haid about this Hundred that I gave him. I asked him for a return of it. He offered to give me a note for it at the time I wrote the check. In February when we had a conversation about this Hundred he said that I owed him a Hundred Sixty-Two and that when I paid him the Hundred and Sixty-Two that he would pay me back this *Two* Hundred. But I don't owe him the money. I didn't hire him. At any rate he said that I owed him a Hundred and Sixty-Two and as soon as that was paid he would pay me back the One Hundred. He made a demand on me for the Hundred Sixty-Two. I never paid that. I don't owe it. There was no difficulty between Mr. Haid and me over the question of how much I owed him. When my brother came back I went over there as I had to show my brother what I did with the money and I asked Mr. Haid for it then. I did not explain to my brother about this Hundred Sixty-Two. If he did it was not in my presence. There was no conversation concerning it, between my brother and Mr. Haid in my presence. In June of this year he sent me another statement for a Hundred Sixty-Two Dollars. Defendant's Identification A-7 is a statement that I received from Mr. Haid in June, 1944.

(Statement admitted as Defendant's Exhibit A-7.)

Plaintiff's Exhibit 5 is a statement that I asked

(Testimony of Ruth McConkey.)

Mr. Haid to make. The only thing he had any connection with in that statement is the \$1225.64 for services rendered for some twelve hundred hours. I gave him the other information written down on that statement. I paid the attorneys' fees indicated and the debts in and around Olympia owing by Margaret amounting to approximately \$500.00. I gave him that information and I paid them.

My mother is Mrs. Elizabeth Mathwig.

Redirect Examination

By Mr. Sager:

I received defendant's Exhibit A-7, a statement for \$163.00 in June. I had a conversation with Mr. Haid just prior to receiving it. That conversation concerned his having gone to my neighbor, Mrs. Highmiller, and said I was talking about her. I went over to Mrs. Highmiller's and she told me what had happened. I then called Mr. Haid up and I said, "Mr. Haid, how can you have done a thing like this to me," and I was crying and he said, "Why, Mrs. McConkey, I don't know what you are talking about," and I said, "If I bring Mrs. Highmiller over there you will know what I am talking about," and by that time I was crying so hard I hung up. I think the next day, or the day following, I got this bill in the mail. I had not received any statement for this amount prior to that time. Plaintiff's Identification 7 was received by me through the mail from Mr. Haid.

(Letter admitted as Plaintiff's Exhibit No. 7.)

(Testimony of Ruth McConkey.)

Q. Now, when you made this loan, would you have made him that loan—I am speaking of this \$100 loan, except for his representation that his check was—his Government check was coming in and was late?

Mr. Johnson: Object to that, if the Court please, as being incompetent, not proper redirect, and immaterial in addition thereto.

The Court: The objection will be overruled.

Mr. Johnson: Exception.

The Court: Exception allowed.

Q. You may answer my question, would you have made this loan to him had he not—had you not believed him to be a Government man, and his statement that his Government check was delayed?

A. No, I don't think I would have. He said he had a check coming every month. He offered a note, but he did not get it.

Plaintiff's Identification 8, I think, is a letter on my brother's case. I received it from Mr. Haid.

(Letter admitted as Plaintiff's Exhibit No. 8.)

Re-Cross Examination

By Mr. Johnson:

I received defendant's exhibit 7 in January, 1944. It is dated January 5, 1943, but that apparently is wrong, it should be 1944. I didn't know Mr. Haid in January, 1943.

The hours shown on Defendant's Exhibit A-7 amount to the same number of hours for which he later sent me a bill for the Miller work.

(Testimony of Ruth McConkey.)

Re-Direct Examination

By Mr. Sager:

The Plaintiff's Exhibit 7, the statement I received in January, does not indicate any amount of money. It merely specifies hours and I did not get a statement in dollars and cents or a bill with that statement. I never got any bill for that in dollars and cents before the statement I received in June.

Re-Cross Examination

By Mr. Johnson:

I did not discuss this statement with Mr. Haid in February. I did not discuss with him in February the fact that I still owed him some money. I didn't owe him any money. In February I asked Mr. Haid for the Hundred Dollars in front of my brother. He didn't say at that time that I still owed him some money. He said his Government check was slow. Nothing was said ever about my owing him some money.

Defendant's Identification A-8 are bills sent me by Mr. Haid. I would say there were others in addition to these because these do not amount to the entire bill, which was \$1225.00.

CARL McCONKEY,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Carl McConkey. I am the husband

(Testimony of Carl McConkle.)

of Mrs. McConkey, who was just on the stand. I am employed as a letter carrier in the Olympia Post Office. I have been a letter carrier for 26 years. I first met Mr. Haid in the early spring, about April of 1943. It was merely a friendly visit to his residence.

We discussed many items that evening. He told me he was a detective, investigator, etc. During the discussion mentioning that I was a letter carrier, he said, "You know I at one time had been employed by the government." And he said he had been employed as a letter carrier, investigating some case. I think people were taking checks out of mail boxes, and he said he served several weeks as a letter carrier in order to carry on this investigation. He mentioned that he had traveled extensively as an investigator. He traveled through Europe, and South America and spent several months, if not totaling several years, in Europe as an investigator. He knew that I was a letter carrier. As to whether he said where this job had been I cannot remember directly, but he did mention that it was very cold, below zero, whether if I recollect, it was either in St. Louis or Minneapolis. He said he had done this for several weeks while carrying on this investigation. As to his saying for whom the investigation was being carried on, he said he was employed by the government. He said he was employed by the government and carried it on in his capacity as a letter carrier for this investigation.

(Testimony of Carl McConkle.)

I saw Mr. Haid, I think, once at his house on the Bay, and possibly three times or so in his other residence. Also possibly a few occasions at our home, but probably only on Sundays because that would be the only time that I would be at home. He displayed a gun to me. He said it was used in his official capacity. At the same time he displayed a pair of handcuffs, the same used in his official capacity.

Cross Examination

By Mr. Johnson:

I did not have anything to do with this investigation. That was handled by my wife. When I saw Mr. Haid it was purely in a social capacity. We played pinochle occasionally.

EVERETT STUART,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Everett Stuart and I live at Route 1, Woodland, Washington. I operate a service station at Woodland and the first time I saw the defendant, Mr. Haid, was on August 17, 1943, late in the evening when he stopped at my station to purchase a tire. He had an Oldsmobile automo-

(Testimony of Everett Stuart.)

bile and I saw one woman and two children in the car. He said he had to have a tire and tube. I asked him if he had a tire certificate and he said no, that it was an emergency case. He said he had been down in Oregon on a seizure case and in case of emergency, the law enforcing officer could get tires.

When he said he was a law enforcement officer, he showed me his credentials which were in a black folder, a regular leather folder in which most credentials are carried, a badge on one side and there was a picture and reading on the other side. I did not read the whole thing. The badge was similar to Plaintiff's Identification No. 2. There was some writing on the badge and all I noticed was "Bureau of Investigation." That is what I looked at, I figured that was enough for me. I did not see the word "detective" on the badge. The badge he showed me was not similar to plaintiff's identification No. 1. He has shown me another badge since that occasion. It was last week when his attorney there was with him, Mr. Kibbe. When he showed me the badge this last week he pulled out credentials. It was in the same type of folder—wanted to know if that was it, and I told him I did not have it pictured as the same badge as that. He said that that was his credential that he had, and I told him, well, I had it pictured altogether different from that in my mind. It wasn't like the one I had seen previously. The badge he showed me last week was not similar to this Exhibit No. 1. It was a little longer badge, I think. The badge I saw this last time said,

(Testimony of Everett Stuart.)

“Haid’s Detective.” It had a picture of the State of Washington on it, the same as this has.

Referring back to the conversation in August, 1943, with respect to the tire—well, naturally a fellow in a service station has not anything to do with the OPA now, is kind of careful what he lets go of, and I told him we should have a certificate on it. He said he did not have one, he was a law enforcing officer and he was entitled to the tire in case of an emergency, and I told him, we have one of the board members here in town, and I asked him to go up and see him, and he said if he could go to his own board he knew he could get a tire ration certificate, and kept talking about calling the board. I knew it was too late to get hold of any of them. I believe it was after five, a good bit, and through his credentials, and all, he promised to send a tire ration certificate back, which he did. He done everything he told me he would do, and I let him have the tire and tube.

As near as I can remember, he was talking about being a Government man and I said, “Well, I am going to let you have the tire since I don’t believe Uncle Sam would put one of his own men in jail. If he does, I will be right behind him and we will both be in jail.”

Q. Did he say anything about how the children were down there?

A. Well, we talked a little bit. Naturally, I was curious when he said he was on a seizure case, as I suppose everybody is, but the way I get it, their

(Testimony of Everett Stuart.)

mother had taken them down there. There had been a divorce or something, as near as I can remember, and she had run off with the children and kidnapped them; as near as the story that I can get it,—as it looked to me.

Q. Did he say anything to you about being a Government man?

A. Well, I am not going to state that he said he was a Government man right out, but he made indications to believe—I thought he was a Government man from his identifications from the Bureau of Investigation. That was the first anything had been said about the government.

Mr. Johnson: If the Court please, I move that be stricken and I object to the question, for the reason that we are charged in the indictment with having represented to be a United States Marshal, and obviously, in view of the answer now of the witness, that is not in conformity with the charge with which we have been charged.

Mr. Sager: We will get to that.

Mr. Johnson: I think we are entitled to have strict proof on it. [3]

The Court: Your motion will be denied at this time.

Mr. Johnson: Exception.

Q. Did you believe he was a Government man?

A. I did.

Mr. Kibbe: Now, I move that be stricken, what he believed. What Mr. Haid had told him is the only thing that would justify that, what he be-

(Testimony of Everett Stuart.)

lieved. He might believe I was President of the United States and I would not be.

The Court: I think the rule would be different, Mr. Kibbe, in this particular charge on this count—where this is one of the counts. I shall have to overrule your objection and allow you an exception.

Q. What was your belief as to what capacity and what he was acting as, as a Government man?

A. Well, my belief, if I seen a star, would mean a man was a law enforcement officer, and naturally bound to be a marshal or police of some kind. I think anybody with any common reason would think the same thing.

Q. What was your actual thought about it, what did you think he was?

A. I thought he was a marshal.

Mr. Johnson: May my objection go to all this testimony?

The Court: Yes.

A. (Continuing): From the reading on his badge, and that is all I paid any attention to, that part of the badge convinced me in selling the tire in truth he was a Government man. [4]

Q. What did you say?

A. I figured he was a marshal, naturally.

Plaintiff's Exhibit 9 is my cash register record for August 17, 1943. Whereupon said exhibit was offered and admitted. Exhibit 9 is a bookkeeping record in itself. That slip is for August 17, 1943. On that particular date there was only one tire

(Testimony of Everett Stuart.)

and tube sale, amounting to \$14.52. That was the item I sold to Mr. Haid.

Plaintiff's Identification No. 10 is an OPA tire certificate which I received through the mail, the 27th of August, which was duly offered and received in evidence and marked, Plaintiff's Exhibit 10.

Cross Examination

By Mr. Kibbe:

When Mr. Haid came to my place he did not give me his card. Afterwards he wrote me a letter thanking me for what I had done for him. The heading of the letter was the Haid Detective Bureau. I did not examine the badge carefully. I never had it in my hand. The only thing that I read on the badge is that "Bureau of Investigation" on it. That is the main thing that I was looking at. I did not see on the upper part of it that it said "Detective Haid." I do not remember any reading up above it at all. It did not say what bureau of investigation—just Bureau of Investigation, without saying Haid's. That is all I seen. It could have said Haid's on it, but I never seen it. All I saw was Bureau of Investigation—his identification, and so on—could have said Haid's Bureau of Investigation—I did not read it. He opened it up and showed it to me—I never had it in my hand. I suppose I could have asked him for it.

About the girls, he said he was on a seizure case. I thought he was some kind of a government man

(Testimony of Everett Stuart.)

because he was on a seizure case. That is what I took for granted. He told me that he had gone down to get those girls to bring them back. He said he was bringing them back to Olympia and had to get them back that evening. I knew he was no common officer of Washington because he went across the state line. I knew that unless you have authorization from someone to go across the state line—I did not ask him, and he did not tell me what special office he held. I was just selling him a tire for which I got paid. Mine was a business transaction. He did everything he told me he would do and the deal was wound up as far as I was concerned. I did not know nor care what kind of officer he was. I was in business. I let him have those things to do what I could to get the children back. I figured I was helping an officer of the law, and according to the OPA I was entitled to in case of an emergency for doctors, and such as that, to furnish tires until such time as a certificate can be gotten. I do not remember his stating definitely what office he held or what capacity of the office, or who he worked for. All I know was that he was a law enforcement officer. He convinced me of that.

Re-Direct Examination

By Mr. Sager:

There was talk about him being a Government man. In fact, he would not have gotten the tire if I had not thought he was a Government man. [5]

(Testimony of Everett Stuart.)

Recross Examination

By Mr. Kibbe:

Mr. Haid did not deny that he was a government man and I wouldn't say that he came right out and told me. When I was talking about him being a government man, he did not deny it. He did not say that he was or he did not say that he wasn't. I said something to him to the effect they would not put a government man in jail, if they did I would go with him. A government man might be any other kind of an officer than a United States Marshal. I did not know what kind of a government officer he was. I took him to be a Marshal. Mr. Haid did not tell me he was getting those children for the Thurston County authorities. He told me he was getting them for the parents. He said that their mother had them—went away with them—and he was getting them for the father.

None of the three badges you now show me (plaintiff's Exhibits 1, 2, and 3) is the one he showed me last week. This other one you now show me (plaintiff's exhibit 11) is similar to the one he showed me last week. It differs from Exhibit 1 in that it is bigger and longer. The one he showed me in August and the one he showed me last week are all somewhat similar, but they did not have the same wording on them. The one he showed me in August had more nickel than either one of these. When I saw the one last week it was altogether different because I was looking for more nickel on it or sil-

(Testimony of Everett Stuart.)

ver. These are similar in shape to the one he had there in August, could possibly be the same one, but as I remember, it was a silver color around here, and there was gold in the center part here, is what I have pictured, with the eagle on it. In fact, I wouldn't swear that the eagle was on top at all, because I don't remember seeing the top of it at all; when it was handed to me it was handed open like that. I thought the one I saw in August had silver along the outside, and in that respect differs from these.

He did not show me other papers that said he was an operator for the Haid's Detective Bureau. There wasn't any other papers he showed me, just the credentials. He gave me his name and address and telephone number, a little card about an inch wide—wrote it in pencil and I put that in the cash register and kept it there. It was not similar to plaintiff's Exhibit 4. It was not that wide at all. It was only a narrow card—just a little narrow slip. On it is merely had Haid and his address. I saw his credentials—the little folder that he had in August. His credentials were on one side; that is, his name and everything was on one side. I did not read it all. It was in a little black folder—badge on one side and reading on the other side. I wouldn't say it said Murrell F. Haid on it. I do not remember. The star took my eye when he opened it up. I did not deny his credentials, that he was a law enforcing officer when he pulled them out. I did not ask and he did not tell me what office he held. He was

(Testimony of Everett Stuart.)

telling me he was an enforcing officer of the law. He was after some tires which he needed bad.

Redirect Examination

By Mr. Sager:

The paper he left with me when he was there on August 17 had his name and address wrote in in pencil.

(Badge was offered and admitted as plaintiff's Exhibit No. 11.)

Q. Mr. Stuart, will you demonstrate how he showed you this badge in August of 1943, how he held it?

A. Well, he had it in a little black folder and just opened it up and held it in his hand, where I can read it like that (illustrating). Anybody could read it, no particular way that I know of that he presented it. I could have took it, I guess, if I wanted to, but he opened it up and showed me.

RALPH MATHWIG,

a witness called on behalf of the Government, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Ralph Mathwig. I live at Tumwater, Washington. I and my mother operate a dairy. I am the brother of Mrs. McConkey and Captain

(Testimony of Ralph Mathwig.)

James Mathwig is my brother. I first met Mr. Haid in April, 1943, when he was investigating [6] a case involving my brother's wife and two children. Margaret Mathwig was my brother's wife and she lived next door to us for some time. The first time he came to see me, he said he was Mr. Haid from "Haid's Detective Agency" and I know he had been engaged by my sister, Mrs. McConkey, to secure evidence. He came out on several occasions. On one occasion, I came to the house and mother and Mr. and Mrs. Haid were in the kitchen. Mr. Haid flicked his head for me to come in the other room so I went in the other room with him and he said, "I presume that your sister told you that I work for the Government." I said, "Yes."

He pulled his badge out and showed it to me, and I did not pay much attention right at first, and we done a little more talking and then he went to work and he held the badge up so I could see it. He held it in one hand. He extra pointed out with his finger, so I could read it, where it stated on the bottom of the badge. If he had not done that I would not have known what it stated on the badge. It stated "Issued by the Department of Justice." If he had not pointed out the fact I wouldn't know what was on the badge at all. Plaintiff's identification No. 2 is not the badge he showed me at that time. I am not certain just how he held it and pointed out with his fingers, so that I could read it, "Issued by the Department of Justice." The badge that he showed me, if I am not mistaken, had

(Testimony of Ralph Mathwig.)

printing on both sides because it was silver color and seemed to be gold color on the bottom. It had more printing on than Plaintiff's Identification 2. The words "Department of Justice" were across the bottom, if I remember right. He held it so that I could read that part. I don't think there was a great deal more said. He told me to keep mum, not to say anything to anyone. During that conversation the FBI was mentioned, but I'm not certain whether Mr. Haid or whether I said it. I don't remember all of the conversation. On another occasion when I came into the house Mr. Haid was examining a box of drugs which had belonged to my brother. He said he was looking for some narcotics because he thought maybe that Margaret Mathwig was using narcotics. He said he was going to take them over to Fort Lewis to have them analyzed. He took the drugs with him and never brought them back.

A. He said he had the right to take them.

Q. Why?

A. Well, being that he was working for the Government, he just the same as had the right to take them. [7]

Q. That is what he said?

A. No, I don't know his exact words.

Mr. Johnson: Then I move it be stricken—the answer be stricken as not responsive to the question.

The Court: Objection will be denied—motion will be denied. The witness said he does not know

(Testimony of Ralph Mathwig.)

the exact words. He is not required to give the exact words. He can give the substance.

Mr. Johnson: Then, I misunderstood, I did not understand that he had said that.

I don't know what happened to the drugs.

Two or three times, he wore army pants and shirts I kidded him along about them once and he said he had a right to wear them. I think he said something about working at Bremerton at the Navy Yard at the time, doing some kind of work over there. The only time he mentioned Fort Lewis was when he said he had received word from Fort Lewis to pick up all the old radios he could get his hands on. I gave him two radios.

There was a partly constructed hospital on my mother's property which we had started to build a little better than a year before the war. We were building it for my brother. I had quit work on it after the war. I hadn't done a great deal because we couldn't get help on the place. It was to be a general hospital to be operated by my brother. I did not want the blue prints made because they would have to be changed. Mr. Haid said that the government did not care about that. They would change it to suit themselves.

He said that he knew Senator Walgren real well, and if I'm not sure he said he knew him personally and had large connections in Washington. He was to turn the hospital over—he wanted to give it to the government free of charge for completing it,

(Testimony of Ralph Mathwig.)

and my brother was to be brought back and put in charge.

I don't think Mr. Haid ever told me what he could do in the matter concerning the hospital. There was some talk about these plans. I didn't want to have them made. They would have to send a copy of the plans to Washington to show them what we had. My mother was to pay for the cost of them, but Mr. Haid was to arrange for getting them through a friend in California. They were to cost, I think, \$75.00. That is what he told me they would cost after he made a telephone call, I think, or something. Nothing actually developed, it just went along, and there were telephone calls and Mr. Haid wrote to Washington, the Senator, as far as I know. His work in connection with the matter was to be free of charge. We were to pay for all expenses, and I believe there were statements submitted to us for expenses. I think it was somewhere around \$300.00 or more. These expenses were taken care of by my mother.

Q. Mr. Mathwig, what did you believe of Mr. Haid's capacity—or,— [8]

Mr. Johnson: If the Court please, object to that, on the ground that it is incompetent and not the proper basis on which—that the testimony is purely a matter of opinion, and the ultimate question to determine is what the facts were, and that matter is for the jury to determine.

The Court: Yes, the jury will finally have to determine the question of whether or not this person

(Testimony of Ralph Mathwig.)

parted with any property or anything on the belief and on the representation of—what he he believes of course is not conclusive of what the factual matter is or was. However, he may answer the question and exception allowed.

Mr. Johnson: Exception.

Q. The question is, Mr. Mathwig, what did you believe Mr. Haid to be?

A. Well, after Mr. Haid asked me whether my sister had told me about whether he worked for the Government or not, and he showed me the badge, why I took him for a Government employee.

Q. You took him for that?

A. I took him for a Government employee.

Q. Did you take him for any particular Government employee?

A. By the badge, I took him he represented the F. B. I.

Q. The words "Department of Justice" suggested that to you? A. Yes, sir.

Q. Would you have let him take these drugs if you had not thought he was a Government man?

A. No, I would not, because I figured we would [9] be responsible.

Q. If you had not thought him to be a government man, would you have entered into this agreement with Mr. Haid with respect to the proposal on the hospital?

A. No, I don't think we would have.

I saw Mr. Haid's gun which he showed to me and I took it and had it in my hands. I saw the gun

(Testimony of Ralph Mathwig.)

on other occasions. He always wore his gun. He later had the barrel changed and said it was Government regulations or something. I saw Mr. Haid's handcuffs. It seems like he always had them in his belt. No, I think he had his gun on one side of the belt fastened on one side and the handcuffs on the other, fastened in his belt if I remember right. I am not positive just how. I saw them on more than one occasion.

Cross Examination

By Mr. Johnson:

The building for the hospital was very incomplete, no rooms had been finished, no windows and only partly covered by roof. There was some discussion between Mr. Haid and my mother, that my mother would be willing to turn the hospital over to the Government on condition that the Government would complete the hospital and after the war was over, it was to be returned to my mother.

I did not see any correspondence between Mr. Haid and Senator Wallgren. None of the correspondence was shown to me. I don't think it was shown to my mother.

I consulted someone about plans and I told Mr. Haid they would cost about \$300.00 and he told me that he had a friend who would do it much cheaper. He called his friend long distance and said the cost would be \$75.00 or \$85.00 for the plans. My mother later approved the expenditure for the plans. During the preparation of the sketch, Mr. Haid con-

(Testimony of Ralph Mathwig.)

sulted with me about a number of changes that should be made. I had a contractor estimate the cost of completing the building and his estimate was between \$40,000 and \$50,000. I conveyed the information to Mr. Haid. There were a number of pictures taken. Mr. Haid told me he had called Washington, D. C., on several occasions. The Government did not take over the hospital building. Mr. Haid did not advise me or my mother that the government had written him and said that they could not use the hospital as it was. He did not tell me that before he came to Olympia he had a Haid's Bureau of Investigation in Texas. He did not tell me that he worked for the Navy in California and at Corpus Christi, Texas.

He was dressed in Army clothes, shirt and pants. I do not know where he bought them, but you know my brother is an officer and I have seen him time and time again. Mr. Haid's shirt was just like my brother's shirt. I do not remember what the buttons were. I couldn't testify to that part, but the pants were just exactly like my brother's as far as I know. They looked identical, the same color and I am positive about that. They had the same texture, them pants were exactly the same as my brother's. They were the light shade of an officer's trousers. [10]

I gave him two radios, both of which were broken to the point, it was expensive to repair them and one had been in the barn. Mrs. Haid was pres-

(Testimony of Ralph Mathwig.)

ent on every occasion that Mr. Haid was at the farm.

The first time I met Mr. Haid he introduced himself as Haid of the Haid's Detective Bureau. That was about April.

During the investigation concerning Margaret Mathwig, Mr. Haig found some X-ray machines of my brother's which were delivered to us.

Defendant's Exhibit A-9 for Identification are pictures that were taken by Mr. Haid of the hospital building, these were offered in evidence and received as Defendant's Exhibit A-9.

Redirect Examination

By Mr. Sager:

I don't really know how the X-ray machine was secured by Mr. Haid but I believe it was on a Court order. It was recovered, I think, from a house where Margaret Mathwig had moved it.

ELIZABETH MATHWIG,

a witness, called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Elizabeth Mathwig. I am seventy-two years of age and I live on a dairy ranch at Tumwater, Washington. I am the mother of Captain James Mathwig, Mrs. Ruth McConkey and Ralph

(Testimony of Elizabeth Mathwig.)

Mathwig. My husband is dead a long, long time ago. Ralph and I operate the dairy together. I met Mr. Haid after my daughter had engaged him to investigate Mrs. Margaret Mathwig. He [11] first came to my ranch on account of the two children. He came several times and on each occasion Mrs. Haid was with him. I saw him quite often in army clothes just like my son had, the light tan ones. I never saw his badge. He showed me the gun. He put it on the table. He showed me the handcuffs and everything, just no badge. He showed it quite often. I saw them on three or four occasions. He gave me some points for meat and I said to him, "You are a Government man and giving me points," and I laughed over it but I took the points. He came out one time and said he wanted to look at the drugs and he took them and said he was going to destroy them. He came out and he said he wanted to look, too, and I gave him the whole box what there was. There was an apple box full and he looked at it. He looked it through and then he came out mit it and then he said, "Well, I take it and I going to destroy it," he told me. He said that he was going to destroy it, that it was dangerous to have in the house. There was no dope in it or nothing—excuse my language. He did not say there was no dope in it, und he took it, see, und the next day he came again, and I said what did you do mit it, and he said it is tended to. You see, I didn't know that he would take it. It came so unexpectedly. I thought he just looks the box through and other-

(Testimony of Elizabeth Mathwig.)

wise I believe I would not let him take it. It wasn't my property.

Q. Did Mr. Haid tell you why he was examining the drugs?

A. Well, he give us to understand that he was a Government man.

Mr. Johnson: I move that be stricken.

Q. Well, what did he say?

Mr. Johnson: Just a moment.

A. That is so long ago——

Mr. Johnson: Just a minute, Mrs. Mathwig.

The Court: I will overrule your objection, Mr. Johnson.

A. I couldn't tell you the exact words.

Mr. Johnson: Exception.

I couldn't tell you the exact words. Anyhow, he says he has the right to take them and look them through.

On one occasion he came out and said that he could get the Government to finish the hospital building and my son could come back and run it. Then he said you get your son right back home, and I said, "No, you can't," and I told that I don't believe you could ever get him back, Mr. Haid was so insistent, oh, yes, he can run this hospital. He can be the doctor there for the government. He said he could do that through his influence in Washington. That his uncle was a Judge. He was to do everything free of charge and I was to pay the expenses that the plans would cost, \$85.00, which I advanced to him. Later I paid some more when the

(Testimony of Elizabeth Mathwig.)

plans came. He said the cost was higher. I got a statement from him. [12]

Plaintiff's Identification 12 is a check for \$84.00 to Mr. Haid. Whereupon Identification 12 was offered and admitted without objection and marked Plaintiff's Exhibit 12.

Plaintiff's identification No. 13 is another check I gave Mr. Haid on the hospital, too.

(Check admitted as plaintiff's Exhibit 13.)

Plaintiff's Exhibit 14 for identification is a statement rendered by Mr. Haid and was offered in evidence and was admitted without objection and marked Plaintiff's Exhibit 14.

Plaintiff's Exhibit 15 and 16 for identification were likewise admitted without objection and marked Plaintiff's Exhibit 15 and 16. These are statements from Mr. Haid and both of them were paid.

I also gave Mr. Haid \$170.00, for which he gave me a promissory note which was to be paid in two or three months. Plaintiff's identifications 17 and 18 are the note and my check to Mr. Haid.

(Check admitted as plaintiff's Exhibit 17 and note as plaintiff's Exhibit 18.)

This note has not been paid. I asked him to pay the note and he told me he had money coming from San Francisco and as soon as he got the money, he would pay me. I have now turned it over to a collector. I also gave him \$18.00 one time and some cash on other occasions to pay for expenses for

(Testimony of Elizabeth Mathwig.)

which he gave me no receipt. Mr. Haid always came out and said he made phone to Washington. He came out once and said he had a letter from Senator Wallgren and that he looked very favorable on the hospital. I gave him in all about \$400.00, including the \$170.00 on the note. During the negotiations and transactions with respect to the hospital and the drugs and one thing and another I talked these matters over with my son, Ralph, but not very much. I also talked with my daughter, Ruth, about Mr. Haid in connection with the hospital and in connection with the children. She brought him out one evening.

Q. What did you believe as to Mr. Haid's occupation or employment?

Mr. Johnson: Just a minute.

A. Well——

Mr. Sager: Just a moment.

Mr. Johnson: There is no testimony here whatsoever that Mr. Haid made any representation to Mrs. Mathwig concerning his being connected with the Government in any [13] degree, and certainly now she may have formed an impression of what somebody else may have told her. That now, is not competent evidence and is objected to on that ground.

The Court: Of course she will understand—the witness understand what she believed or what she thought at that time, and not what she thinks now. The question is limited to that extent. The objection will be overruled and exception allowed.

(Testimony of Elizabeth Mathwig.)

Q. At the time, Mrs. Mathwig—at the time Mr. Haid was coming out to your place, what did you believe was his occupation?

A. That he was a Government man.

Q. Would you have permitted him to take the drugs if you had not believed him to be a Government man?

Mr. Johnson: Object to that.

A. No, I wouldn't.

The Court: Whenever there is an objection, you wait.

Mr. Johnson: Object to this on the basis there is no testimony now in evidence, so far as Mrs. Mathwig is concerned, of any impression she received from Mr. Haid himself or any misrepresentations on his part as to the fact that he was not—that he was employed by the Government in any confidential capacity.

The Court: Objection will be overruled, Mr. Johnson. Exception allowed.

Q. Would you have entered into this arrangement with him for the attempt to reconvert the hospital if you had not thought he was a Government man?

Mr. Johnson: Object to that, if the Court please, [14] on the same ground.

The Court: Same ruling.

A. No, you wouldn't do this to a perfect stranger.

Q. Would you have loaned him the \$170 on the note? A. No, I wouldn't, neither.

Mr. Johnson: Same objection.

(Testimony of Elizabeth Mathwig.)

The Court: Same ruling.

Cross Examination

By Mr. Johnson:

Mr. Haid never did tell me directly that he was a Government man. I knew he was employed by my daughter to secure evidence so that my son might secure the custody of the children and was employed as a private investigator or special investigator. He never told me directly "I am a Government man," or "I am a F. B. I." or "I am a marshal." He only said he had influence with the Government. From my own independent knowledge of what Mr. Haid said to me I formed an opinion that he was a Government man.

Q. What did he do now, and what did he say to make you believe he was a Government man? I mean, he, himself, not what somebody else told you. What did he himself do to make you believe he was an officer of the United States?

A. Not to me.

Q. No?

A. I based my thought that he was a Government man on all his actions, how he acted around and everything. He never said directly that he was a Government man but when we spoke to him as though he was he never corrected me neither. Like in the grocery store when I said "you give me points and you are a Government man" and all like this. He never corrected me. No, Mrs. Haid did not give me the points. It was Mr. Haid. Mrs.

(Testimony of Elizabeth Mathwig.)

Haid stayed in the car. Another thing that led me to believe that he was a Government man was when he said he had his influence and the like in Washington.

I thought he was a F. B. I., although he never said he was a F. B. I. He made a kind of impression on me. I knew that my son was paying him for his services. He suggested the idea of the hospital and I thought it was a good idea. The plan was that the Government was to finish the hospital and use it and in a certain number of years to return it to my son when he gets back and he could pay the Government on contract what was spent on it. I was given a copy of the plans prepared by Mr. Brown. I was to pay for the plans, telephone and [15] postage. He was not to charge for his time spent in matter and there was no mention of his charging for gas and oil, and I paid him about \$225.00 for such expenses. I don't have checks or receipts for the payments I made to him other than those I have put in evidence. Lots of times I have paid him in cash.

He never wore any army coat or hat but he did wear army trousers but I cannot say for sure about the shirt. His army trousers looked just like my son's.

When he mentioned the handcuffs, it was just in fun and there was not anything serious about it. When he showed me those handcuffs on any occasion I think he wanted to impress upon a per-

(Testimony of Elizabeth Mathwig.)

son, that is why he showed them. On one occasion he laid them on the table.

My granddaughter's husband worked for Mr. Haid and at one time was sent to San Francisco and one time went East of the mountains and one time went to Puyallup on an investigation. He said he was going to destroy the drugs. He said they were dangerous to have in the house.

Redirect Examination

By Mr. Sager:

His frequent handling of the gun and handcuffs led me to think he was a Government man. A common person just don't have those kind of things.

ELMER J. BROWN,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Elmer J. Brown. I live in Los Angeles. I am a draftsman employed by the Automobile Club of Southern California. I am distantly related to Mrs. Haid. I had a telephone call with Mr. Haid in 1943, in reference to some plans. \$50.00 was mentioned as the cost, and later received a letter from Mr. Haid which is Plaintiff's Iden-

(Testimony of Elmer J. Brown.)

tification No. 19. This letter followed the first telephone call.

Said Exhibit for identification was offered in evidence and admitted without objection and marked Exhibit 19. [16]

I received in that letter a cashier's check for \$50.00.

Plaintiff's Identification No. 20 is another letter I received from Mr. Haid and with that letter I received \$25.00 or \$35.00.

Plaintiff's Identification No. 20 was admitted without objection and marked Plaintiff's Exhibit No. 20.

I prepared the sketches and plans and sent them to Mr. Haid and some corrections were made after telephone conversations with Mr. Haid. Three copies of blue prints were also made.

Cross Examination

By Mr. Johnson:

I received some sketches from Mr. Haid which were in a rough state and I redrew them. I discussed the new plans with Mr. Haid over the telephone and made corrections. I had four or five telephone calls with him and received a total of \$85.00 in cash. I did not pay for the telephone calls.

EDWARD F. SHARPE,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Edward F. Sharpe and I live in Olympia, Washington, where I operate a drug and grocery store. I am also a pharmacist. [17] I have known Mr. Haid for about two years.

In April, May or June of 1943, he brought me a box of drugs and said, "Well, here are some drugs I thought you could use, and if there is anything you don't want, just throw them away." Some of the drugs were outdated and I threw them away, the others I put on my shelves. I disposed of some of them. I gave them later to Mr. Wilson, an agent of the F. B. I. There was about one-third of the original lot left then. The value of the drugs I gave Mr. Wilson is possibly between Ten and Fifteen Dollars.

Cross Examination

By Mr. Johnson:

Mr. Haid never asked for nor did he receive any credit for these drugs.

JOHN J. LOCHER, JR.,

a witness called on behalf of the plaintiff, after having been first duly sworn, testifies as follows:

Direct Examination

By Mr. Sager:

My name is John J. Locher. I live in Tacoma and am a Special Agent of the Federal Bureau of Investigation. I first saw Mr. Haid on August 24, 1944, at his home and residence in Olympia. Mr. Wilson was with me. We examined a ledger sheet from his records pertaining to the Mathwig Hospital. I copied that ledger sheet. It is plaintiff's identification 21. The original was left with Mr. Haid. Plaintiff's identification 21 is an identical copy of the ledger sheet with the exception of my initials "J. J. L." and the date "8-24-44" that appears in the upper left hand corner of it. This copy was made in the presence of Mr. Wilson and Mr. Haid, and I think Mrs. Haid. The original ledger sheet showed entries of both debits and credits. It showed items of expense for long distance calls to Los Angeles, and to Washington, D. C., to Senator Walgren; for postage for a roll of film and for developing and printing. A debit of \$10.00 for architect and another debit under architect for \$45.00. The total was shown as \$170.31, and it showed credits of \$78.43 and \$85.45. The last date on the ledger sheet was 7-21-43. It contained an entry to Elmer J. Brown, followed by a debit entry in the sum of \$50.00.

(Testimony of John J. Locher, Jr.)

Cross Examination

By Mr. Johnson:

In addition to the total appearing on the front of the ledger sheet in the sum of \$170.00, there were two items appearing on the back that were \$18.80 and \$7.75. Those added to the \$170 would make approximately \$197. I did not make the computation. I merely testified what the ledger sheet showed. Mr. Haid gave us this information without hesitancy when we asked for it.

ALICE GERTRUDE HIGHMILLER,

a witness, called on behalf of the Plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Mrs. Alice Gertrude Highmiller. My husband is now in Northern Burma, in the service. He has been in the service two years last September 3rd. My home is in Olympia. My home is next door to Mrs. McConkey. I have known her about two years.

I first met Mr. Haid the 1st of February, 1944, in my home, about two weeks before that I had a telephone call from Mr. Haid. He introduced himself as Mr. Haid and said that he had received a telephone call regarding me. He said some person

(Testimony of Alice Gertrude Highmiller.)

called him suggesting that he send a business card to Dr. Highmiller and asked if I knew anything about it. I replied that I certainly did not know anything about it and had no idea what he was talking about. He said he wanted me to know before he sent the card to Dr. Highmiller; that he would not do so without consulting me first, that his was an ethical detective agency. He said the call had been anonymous, that the party who called would not give her name. I told that my only conclusion was that evidently somebody wanted to cause trouble between my husband and myself. He said that there had been a previous call to him which he had not received because he had been at one of the local schools finger-printing the children which he had been ordered to do by the Government. He said he was not being paid for it but that it meant about Two Thousand Dollars of his time and expense but that the Government had ordered him to do that finger-printing of the school children. He said that he finally had asked the person who called if it were a civil offense, a criminal offense or a marital offense and she had replied "a marital offense" and he explained to the person that he was not interested in that type of thing, that they did not make investigations of that type.

I asked him if it was a woman and he said "yes."

He asked me if I had noticed anything unusual and then I thought of an incident that had seemed unusual. About a week before I had received sev-

(Testimony of Alice Gertrude Highmiller.)

eral 'phone calls and when I would answer the other end of the line would not answer.

Mr. Haid stated to me that through his connections he could place a man down at the telephone company behind the board and find out who was making those calls to me. I said to him that that was against the Federal Communications law and he said, "I don't mean to say I could listen in on a conversation, but I could place the man down there and they could check every number that was calling your house and we could check back on the board. And he said for me to let him know if he could be of any assistance and we concluded our conversation. This telephone conversation lasted about half an hour.

The next time he called me was on January 27th, which I remember as being my son's birthday. He said he decided to call me to see if I had been bothered by any more anonymous 'phone calls. I told I had not. On the first call he asked me if I had any nosey neighbors. I told him that I did not know that I had any and he said "I would find out who is doing this to me and then I would go over there and slit their throats and tell them to mind their own business." I told him there were only two neighbors close enough to know what was going on around my place, one of them being Mrs. McConkey and I said to him, "You could tell me more about McConkeys than I could." In a later telephone conversation I asked Mr. Haid if he recognized the anonymous voice on the telephone

(Testimony of Alice Gertrude Highmiller.)

and he said he thought he did. He said he knew only one family in the neighborhood and I said "I don't see how she has time to interest herself in my affairs because she has just taken those two little girls to take care of." I also told him "that is what is hard for me to believe that Mrs. McConkey would be doing that sort of thing to me" because I had only friendly relations with her and I was not too well acquainted with her at that time. Mr. Haid said if he could think of any way in which this case could be handled he would let me know.

The following day he called and asked if he could come to the house that he wished to discuss something with me. We arranged that he should come the next evening which he did. We immediately started our conversation about these anonymous 'phone calls to Mr. Haid. I called Mrs. McConkey by name and said that I didn't believe that she had any interest in my affairs and I couldn't understand if she did why she was more or less knifing me in the back. He shrugged his shoulders and said, "Well, she has done it to us."

He had not been in the house long when he showed me his gun which he explained had recently been cut down from a 4-inch barrel to a 2-inch barrel, in compliance with Government orders. He took the bullet out and handed me the gun.

He said he had been in Texas and had been sent from Texas to California to do special work for the Navy. I said, "Oh, then you are an F. B. I. man?" and he said, "No, don't misunderstand me,

(Testimony of Alice Gertrude Highmiller.)

please, Mrs. Highmiller, I am not an F. B. I. man." I said, "But you do special work for the Government," and he said "yes" and he went on to say that he had been sent from California up to Washington and was to locate in Tacoma but because of the housing situation they had located him in Olympia and that he was doing some sort of special work at Fort Lewis.

He asked if I knew Eddie Sharp and I told him I knew he was a pharmacist. He said that Eddie Sharp was awfully curious as to why he wore army pinks and then he explained that he had four or five pairs of army pinks and seven or eight army shirts. I asked him if he wore them when doing special work at Fort Lewis and he answered "yes." He then said that Eddie Sharp was so curious about his wearing army pinks that he had told him that he was going to go down to the police station and find out what he was doing and Mr. Haid said "let him go. He won't find out anything about me. After all they don't have any published list down at the police station."

As to his being connected with the Government, he did say that he was sent up here. That he had told them that this was his last move, that after all when you had a family and you were trying to raise children and you stayed about one year in one place and then were sent to some place else that it was very difficult to keep moving the children and raise them properly and so his move here was to be his last move. He said he had been doing

(Testimony of Alice Gertrude Highmiller.)

special work for the Navy in California. That when he did special work at Fort Lewis he wore the army pinks and the army shirt. In connection with having his gun barrel shortened he explained that he could have this done at the Fort but that the guns were being altered at that time and it would take two or three weeks and therefore he had it done in Olympia. As to the problem he had come to see me about that night he had come to the conclusion that the way to handle that was just to let it go and not say anything and in time it would come about naturally that we would probably find out why Mrs. McConkey had said this and was doing this sort of thing to me. He said if he could be of any assistance in any way to please call him. He was there that evening about one and a half hours.

Cross Examination

By Mr. Johnson:

I did not see Mr. Haid again after that nor have any more telephone conversations with him. He didn't ask me to pay him anything and I didn't pay anything or give him anything of any kind.

RUTH McCONKEY,

resumed as a witness on behalf of the Government and further testified as follows:

Direct Examination

By Mr. Sager:

I never made a telephone call to Mr. Haid anonymously with respect to Mrs. Highmiller.

ORVILLE R. WILSON,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Orville R. Wilson and I am a Special Agent, Federal Bureau of Investigation. I have investigated this case. I first called on Mr. Haid on August 21, 1944, again on August 24, 1944, and again on September 28, 1944. On the first occasion Agent Flanigan of the Federal Bureau of Investigation accompanied me. I advised Mr. Haid on this first occasion that we had received certain complaints which, if true, might be a violation of the impersonation laws and said that I desired to question him concerning such complaints. I asked Mr. Haid if he carried credentials, badges, handcuffs, and a revolver and he said he did. He produced his credentials from his person. Plaintiff's exhibit

(Testimony of Orville R. Wilson.)

No. 4 is the type of card he showed me as his credentials. It was a blue card carrying the name "Haid's Bureau of Investigation." On the back of it was his picture. In the picture he had on an army officer's type cap and what appeared to be an army officer's type shirt. The picture on plaintiff's identification No. 22 is similar to the picture that was on the credentials he showed me at that time, but plaintiff's identification No. 22 is not the credentials that he showed me at that time.

Voir Dire Examination

By Mr. Johnson:

The credentials are not the same. There is a very distinctive difference. No. 22 says "Haid's Detective Bureau" and the blue credential card which he had (Plaintiff's exhibit No. 4) said "Haid's Bureau of Investigation." The remainder on the two cards appear to be the same.

(Card admitted as Plaintiff's Exhibit No. 22.)

Later, on August 24th, he showed me a credential card like plaintiff's exhibit 22.

Direct Examination

(Resumed)

By Mr. Sager:

On this first occasion he produced one badge which he was carrying in some portion of his coat. Plain-

(Testimony of Orville R. Wilson.)

tiff's identification No. 2 would appear to be an identical badge.

(Three badges received from Mr. Haid were admitted as Plaintiff's exhibits 1, 2 and 3.)

He stated he had been operating in Olympia under the name of "Haid's Bureau of Investigation." That the picture of him with a cap on was not an army cap but that he had been employed as a guard in a defense plant in California and this picture was a picture of him in his guard uniform. I asked him why he used this picture of him in uniform on his credentials if he were acting as a private detective and he said it was the only picture he had.

I then referred to this permit number on the credentials. He said that was his permit number to carry a revolver and I believe also it had a finger print stamp in here. His finger print stamp on the credential. He showed me his gun at that time, producing it from his person and said he had a permit to carry the gun.

He said he carried handcuffs and produced them from his person. I asked him if he ever used his credentials by placing his thumb over the word "Haid's" and saying "I am Haid of the Bureau of Investigation," and he said that he had never done so. I asked him if he had done so what would be the implication from that and he said, "that would have meant that he was Haid of the Federal Bureau of Investigation." He said he had re-

(Testimony of Orville R. Wilson.)

cently changed his business name to "Haid's Detective Agency" or "Haid's Detective Bureau" because "Haid Bureau of Investigation" might be misconstrued to mean "Haid's Federal Bureau of Investigation" or the Federal Bureau of Investigation and that during war time he did not want any question of a misrepresentation to arise. He said that in order to make that change he had already requested that new credentials be printed for him, and that while he was still carrying the badge "Haid's Bureau of Investigation," that he had ordered a new badge. This conversation about the badges and credentials was on my first interview with him on August 21, 1944. On my next meeting with him on August 24th he then produced badges and credentials which were similar to plaintiff's exhibit 22. He said this was to be his new type of credential. He said his new badge had not come yet. Then on September 28, 1944, when I again interviewed him he produced a new badge which was identical to plaintiff's exhibit One. At that time there was a general discussion about badges and I produced my official badge and he expressed interest in it and said "well, that badge isn't as good as the F. B. I. agents carried a few years ago," and he said at that time they carried a very impressive badge. He described it as having the phrase "Bureau of Investigation" and "Department of Justice" looped around the center of the badge and then he said there was a wide enamel circle on this F. B. I. badge and that on that white

(Testimony of Orville R. Wilson.)

enamel surface was a star. On August 21st and 24th the badge he showed me was identical to plaintiff's exhibit No. 2. On September 28th his new badge was identical to plaintiff's exhibit No. One.

We talked about his trip to Portland, Oregon, and the Mathwig children. I asked him if during that trip he had a blow-out near Chehalis and if he stood by the side of the road and flagged a passing motorist by using the badge held in the palm of his hand in this manner (illustrating) and he said he had done that. I asked him who he intended to represent in so acting. He first said he intended to represent himself as a private detective and I said "do private investigators use badges in stopping motorists" and he then said, "well, he intended to represent a law enforcement officer at that time but not a Federal law enforcement officer." I asked him what type of law enforcement officer he intended to represent and he didn't reply.

I asked him about the Mathwig Hospital building and he said Mrs. Mathwig had requested that he help her and that he was to receive no fee except expenses. He first said he had expended between \$125.00 and \$150.00. I told him I had seen his receipt to Mrs. Mathwig for an architect's fee in the sum of \$120.00, and he then said he would have to revise his figures upwards. He then produced a ledger sheet and I asked him if he had any vouchers to support the items listed on the ledger. He said he had no vouchers but could produce them. On August 24 he produced an itemized statement

(Testimony of Orville R. Wilson.)

which is Plaintiff's Exhibit 23. We had a discussion then concerning the Mathwig account. His ledger sheet showed an item of \$75.00 to Mr. Brown for these blue prints. He said he guessed that was the final price he was to pay Mr. Brown for these blue prints. Then I showed him plaintiff's exhibit 14, a receipted bill to Mrs. Mathwig, showing architect's services and blue prints, \$120.00. I asked him why he billed her \$120.00, when the ledger shows total payment in the sum of \$75.00. He then said Mr. Brown estimated the services at \$120.00 and he had billed Mrs. Mathwig without waiting. There were items on his ledger sheet of \$75, \$45, and \$10, and I asked him to reconcile those figures with his bill to Mrs. Mathwig in the sum of \$120.00 and \$50.01. He said he couldn't reconcile them, that he guessed he was a poor bookkeeper. We went through plaintiff's exhibit 23 item by item. He said, concerning the first item to Fred Haid at St. Louis, \$5.30, that Fred Haid was his father. I asked him why he called his father in connection with getting the hospital under government control, and he said his father was a retired clerk of the probate court, and he thought he might have some influence some place. He gave the same explanation to the next item. As to the item under date of September 7, he said that was for a telephone call to Senator Champ Clark's Secretary. There were additional items noted July through November, and I asked him why they hadn't appeared on his original ledger page, and he said well, he had expended

(Testimony of Orville R. Wilson.)

them so he was adding them in. As to the item of \$75 to E. J. Brown for plan drawing in the sum of \$75, he said, that was the correct amount rather than \$120.00. I asked him to explain why his original ledger page ended with a date of approximately July 21, 1943, and this account ended with an item of December 15, and it appeared that there were approximately 8 or 9 additional expenses incurred after July 21, and he said, well, he had gone on with this matter after that time, and I asked him when he had received information that the hospital was not going to be used by the government, and he said that he had received that information from Senator Wallgren toward the end of July, 1943. Plaintiff's exhibits 24 and 25 are letters that I received from Mr. Haid's file on the hospital matter.

(Letters admitted as plaintiff's exhibits No. 24 and 25.)

Plaintiff's Exhibit 25 for identification was [19] offered and admitted without objection.

On August 21, 1944, Mr. Haid stated he was not employed by the Government and had not been employed by the Government since coming to Olympia.

Plaintiff's Exhibit for identification No. A-26 are the drugs turned over to Wilson by Edward Sharpe. They were offered and admitted and marked Plaintiff's Exhibit 26.

(Testimony of Orville R. Wilson.)

Cross Examination

By Mr. Johnson:

Defendant's Exhibit for identification A-13 is the receipt I gave for the Mathwig file. Offered and admitted and marked Defendant's Exhibit A-13.

Haid said he had worked for the Navy and as a guard in defense work in California and Texas.

He showed me Defendant's Exhibit A-15 which is a certificate.

Defendant's Exhibit for identification A-14 is the correspondence and papers in the Mathwig file turned over to me by Mr. Haid. Offered and admitted and marked Defendant's Exhibit A-14.

Defendant's Exhibit for identification No. A-16 is an identification card issued by the City of Olympia. It was offered and admitted and marked Defendant's Exhibit A-16.

He told me he had operated a detective bureau in Wichita Falls, Texas.

The badge I carry now is not like the badges turned over to me by Mr. Haid.

He told me on August 21, 1943, the first time I [20] called on him, that he had already made arrangements to change the name of his business.

Defendant's Exhibit for identification A-3 is a leather folder in which Mr. Haid carried his credentials.

It was offered and admitted without objection and marked Defendant's Exhibit A-3.

On August 24th, he gave me an itemized statement of the Mathwig account in the sum of \$204.44.

(Testimony of Orville R. Wilson.)

He said he had received approximately \$196.00 and a few cents.

He said he had called his father who was a retired Clerk of Probate Court in Missouri, who he thought might have some influence; he also called Captain Reagan at San Francisco and had contacted some Government department in reference to the hospital building.

He said he had hoped something could be worked out for the hospital and that is why he continued his efforts.

Defendant's Exhibit for identification A-17 is the permit issued by the Police Department of the City of Olympia to Mr. Haid to carry concealed weapons. It was offered and admitted without objection and marked Defendant's Exhibit A-17.

Redirect Examination

By Mr. Sager:

The correspondence I received from Mr. Haid did not include the original ledger sheet.

The gun Mr. Haid showed me on August 24th is the same as Plaintiff's Exhibit for identification 27. [21]

Mr. Sager: We will offer it.

Mr. Johnson: Object as immaterial, not pertaining to any issue in this case.

The Court: Objection overruled, it will be admitted in evidence.

(Thereupon, gun referred to was then received in evidence and marked Plaintiff's Exhibit No. 27.) [22]

JOSEPH RICHARD GIBBONS,

a witness called in behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Joseph Richard Gibbons, and I am manager of the Pacific Telephone and Telegraph Company at Olympia. The records of that office are under my control and custody.

Plaintiff's exhibit 28 is a long distance call record, which shows the telephone number placing the call. The number is Olympia 5700, which is Mr. Haid's telephone number. This call was placed December 14, 1943, but was actually completed December 15, 1943. On our bill to the customer this call will be shown as on December 15. Our records do not show any other long distance toll on December 15 by Mr. Haid to St. Louis, Missouri.

(Long distance toll record admitted as plaintiff's exhibit 28.)

The total charge indicated on the record is \$6.20 plus the tax. Call was made to the Laddis Pharmaceutical Company.

Cross Examination

By Mr. Johnson:

I could not say whether there was any other call by Mr. Haid on some other telephone.

(Testimony of Joseph Richard Gibbons.)

Redirect Examination

By Mr. Sager:

If a call had been placed over another telephone and chargeable to this telephone number on that date, it would show in these records that I have brought. There were no such. If such a call were not directed to be charged to this telephone number it would not show in this record.

MARY GOWAN LILLIBRIDGE,

a witness called on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Mary Gowan Lillibridge. I live at Route 6, Olympia. It is about six miles from town out on the Bay. My husband is in the Army as a medical officer. At our home we have a cabin and a part of our home which we rent out. I first met Mr. Haid on April 6, 1943. He and his family came out to see our cabin which they wished to rent. He said that he wanted to look at the cabin, that he had been sent out by the real estate agent, and I said, "Oh, but you are civilians? I expected officers because that is why I have it rented. I rent it for officers." He said that it would be the same as renting to an officer because he was in the em-

(Testimony of Mary Gowan Lillibridge.)

ploy of the government. I noticed his car had a California license, and he said he had been sent up by the government to this defense area. He did not say definitely what he was to do here, other than he was in the employ of the government and that in renting him the cabin I would be doing as much a service to my country in having him as I would in having an army officer. I rented the cabin to him.

He said he must have a telephone. We were on a farmers' line and you have to have a share of stock and you have to buy your own telephone instrument. My daughter and I and Mr. Haid put in the telephone for him the following day. He said he needed it in his business, that he had to have a telephone. Mr. Haid said on one occasion, regardless of how many times the telephone might ring we were never to answer. He said the calls were personal and confidential and we were not to interfere in any way and we respected his request. He said he was doing work for the government; that he had been on special assignments in the South and he was much interested in finger printing. He always had on his gun in evidence. He usually carried it in a holster, or else when they were in the house, it was very readily available. It was always in evidence.

He kept the house locked to the extent that the youngsters could not get into the upper part of the house. Mr. Haid told us very definitely not to go near because the house was wired and we would

(Testimony of Mary Gowan Lillibridge.)

get a terrific shock if we tried to. If the house burned down, let it burn. He said he kept the house locked and wired because there are very confidential matters in it, and he did not want anybody getting in, even the youngsters.

A boat had been washed up on our shore and I reported it to the Coast Guard. Mr. Haid wished to use the boat and I told him that it would not be possible for him to use it because the Coast Guard had given directions that it should not be used until a year later, but that he might inquire at the Coast Guard. I told him he would have to have a Coast Guard identification if he were to use it, because they were very rigid about their identifications. Mr. Haid said it would not be necessary because his credentials were so much better than the Coast Guard, that his means of identification was better.

I believed Mr. Haid to be a member of the FBI. I arrived at that belief because he wore a uniform type of clothes, because of his conversation about investigations and government assignments. I would not have rented the premises to him if I had not believed him to be a government man, nor would I have installed a telephone at that time.

Cross Examination

By Mr. Kibbe:

I tried not to interfere with their business, but at one time I asked Mr. Haid if he had been connected with the State Highway Patrol in California

(Testimony of Mary Gowan Lillibridge.)

because he wore a similar uniform with the insignia, and he said he had not been a part of the patrol, but he had worked directly with them. He wore this uniform right along out at the Bay. It was an old one with the insignia off. It was suntan breeches with boots or puttees, and a cotton suntan shirt, and over the breast pocket there was a dark spot that looked as though it had been under a patch. I doubt if you could buy that type of shirt and pants at a department store. It was not an army uniform because they don't wear breeches except in the Cavalry. He said he was working for the government and if there was any opening to mention assignments for the government they were made the most of. He did not say in what department he was working. He did say that the finger prints were sent to the Department of Justice. I knew that he was taking fingerprints of the school children in Olympia. He used our workshop to remake a holster for his gun. I asked him if he was a member of the FBI and he said, no, but he was working directly with them. He said he was very busy with government assignments and therefore I must not use the telephone. He did not tell me what assignments he had, or where they were or when they were. I do not know what he was or what his work was, other than what he represented to us. He represented to us that he was working for the government and in renting it to him it was the same as renting to an army officer. I had my house listed with the housing bureau and the real estate

(Testimony of Mary Gowan Lillibridge.)

agent only for army personnel, and when he came out I said, "You are civilians, I expected army people." I thought I was helping in the housing shortage someone who was working for the government. I rent primarily to give officers and their wives a chance to be together because I could not be with my husband. He said he was working for the government and I would be helping—he was plausible and I believed him. I think he misrepresented to me the fact that he was working for the government.

JEAN LILLIBRIDGE,

a witness called on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Jean Lillibridge. I am the daughter of Mrs. Lillibridge, who just testified. I am 19. At one time while at Mr. Haid's cabin I saw some envelopes and papers on his desk and asked him what they were for, just common curiosity, I guess, and he said they were some work he was doing for the government.

Cross Examination

By Mr. Johnson:

He just said that he was working for the government and nothing more. With respect to these envelopes and papers he said they were something for the government and he was very busy.

IRENE NELSON,

a witness called on behalf of the plaintiff, after being first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Irene Nelson. I live at Olympia, where I operate an antique shop and resell shop. The name is Irene Nelson's Shop. I first saw Mr. Haid the latter part of May, 1944.

I had a candid camera in my shop for sale and he came in and looked at it. It was a consigned item, that is an item that I had just taken in to sell for another party. The first time he just looked at it and then he came in a few days later and looked at it again and said, "You know this is the kind of camera I want. This is the kind we use in our work." In the course of the conversation Mr. Haid told me that his work was FBI-Secret Service.

Then he told me that he would like to get it, but he did not have the money, and I told him I would hold it with a deposit down. I could hold it for two weeks, but my shop rules were not to hold anything on deposit longer than two weeks, and he told me he could make a deposit of \$5.00 and that he would pay the rest in just a short time because he had a check coming from Washington, D. C., and he said "Sometimes you know those checks are late." He made the deposit of \$5.00. Plaintiff's identification No. 29 is the sales slip which I made out the day he made the \$5.00 deposit. It is dated June 1, 1944. This identification is the duplicate. He has the original. He assured me he was very happy in

(Testimony of Irene Nelson.)

having located such a camera as it was essential in his work.

He came in again about the 15th and told me he hadn't the money; that his check had not come. I told him I could not keep the camera indefinitely, so he paid me \$3.00 more. Plaintiff's identification No. 30 is the receipt for the \$3.00, dated June 22. He told me two or three times that he was using it for FBI work and Secret Service. On one occasion I told him, "That is a little strange. I didn't know we had an FBI man here in Olympia," and he said "uh huh." I do not know exactly when that conversation was, but it was either when he made the \$3.00 payment or when he paid the balance. A few days after he made the \$3.00 payment he came in and said he would not be able to take the kodak and wanted his money back. I told him I wouldn't return his money, that he had kept the camera out of stock for almost a month, that I would put it back in stock and when I sold it I would return his \$8.00. I put it back in stock and some days later he called me long distance from Tacoma and said he would come in and pick it up. I asked him if he had the money and he said yes. He came in the next day and paid the balance, which was \$20.33. This last payment was made the last couple of days in June, or the first couple of days in July. He told me he was an FBI man and I believed him. Had I not believed he was with the FBI I would have held the camera for him for only two weeks but no longer.

(Testimony of Irene Nelson.)

(Original sales slip furnished by Mr. Johnson was substituted for duplicate previously identified as plaintiff's 29, and admitted as plaintiff's exhibit No. 29. Receipt admitted as plaintiff's Exhibit No. 30.)

Cross Examination

By Mr. Johnson:

I wanted to sell the camera. If anyone else paid a deposit of \$5.00 I would have kept the camera for him, but after the two weeks were up the camera would have gone right back into stock. The notation, "Will call for it the 15th, or shortly thereafter," appearing on plaintiff's exhibit 29, I put there because he told me his checks were sometimes late from Washington, D. C. When he came in on the 22nd and paid me \$3.00 I still thought he was an FBI man.

He did not give me his card on June 1, but later he came in and laid his card on the counter. I began to doubt he was an agent of the FBI on June 15 when he did not show up. Later when he came in and told me his check had not arrived and he could not take the kodak, then I felt there was something wrong. By the time I delivered the kodak to him I knew he was not with the FBI.

Redirect Examination

By Mr. Sager:

When he came in shortly after the 15th and his check had not come from Washington, D. C., I was very suspicious and I called the Police Department. From that time I knew he was not an FBI agent.

LAURA MAY CAMFIELD,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Laura May Camfield. My husband's name is Clarence Camfield. I live at 1200 East 10th Street, Olympia. I am the grandmother of Wildabelle Sorrel. I am seventy-two years of age.

About the 6th day of February, 1944, Mrs. Sorrel, who lives across the road from Mrs. Gross, disappeared and I placed an ad in the paper offering a \$100 reward. Plaintiff's Exhibit 31 for identification is the ad I placed in the paper. I don't think the ad had been in the paper more than a week when Mr. Haid came to my house. It was on the 3rd of April, 1944. He came to the house, said "I am Mr. Haid." I invited him into the house. He represented himself by saying that he was from the Bureau of Investigation. He showed me his badge at that time, taking it from his left, here, in a manner of putting his hand over, and I just stepped over and read the lower part of it, and it said Bureau of Investigation.

Q. Will you show the jury just about how he handled that badge when he showed it to you?

A. Well, he took it from the side like this (illustrating).

Q. You show it to the jury so they can see.

A. To the side like this, and I stepped over and

(Testimony of Laura May Camfield.)

I read Bureau of Investigation, but I did not see the word "Haid," or any more to it than that. [23]

Q. And then what else was said about it at that time?

A. Well, I said "Well," and he said he was a private detective himself, and I said "How many F. B. I.'s and private detectives are there in Olympia?" and he said "Three," and that was all that was said, as far as three was concerned, and he didn't say who they were or anything about it. Now that is just the way that he said that, and then he went to asking questions about the girl, and of course, I answered him, and he asked different questions, and I couldn't tell you either one of the questions that was asked, just offhand, but the next question, I said, "Well," I said to him, I said "Does the F. B. I.'s and private detectives take cases of this kind?" and he said "We do sometimes on occasions," and he says "Yes, we do." "Well," I said, "Well, would they take a case for that small amount of money?" and he said "Yes, we can."

I told him that I would only give \$100.00. I said to him, "We are poor people and we are doing this on our own account, offering the \$100.00," and I said I could not offer any more than \$100.00, would they do that for that price—look for the girl for that amount of money? And he said they would. He then made out a receipt, and I said, "Do they take money in advance?" and he said, "Yes, on occasions of this kind," and I handed him the

(Testimony of Laura May Camfield.)

money in a \$100.00 bill, and he gave me the receipt, and I said, "Guess that's the largest piece of money you have had for a long time?" and he said, "Oh, no, I went down to California and brought back some prisoners. I got over \$2,000 for it."

I asked Mr. Haid, "How does the F.B.I. go about finding anyone like this," and he said, "Oh, we have ways to find them." I asked him how long it would take and he said, "It will take a week, or two weeks, or six weeks, but we will have her back."

Plaintiff's Exhibit for identification No. 32 is receipt I received from Mr. Haid.

Plaintiff's Exhibit for identification was admitted without objection and marked Plaintiff's Exhibit No. 32.

I saw him on two occasions after that, at which time he told me that my granddaughter had run away with an Indian. He showed me his gun. After he gave me the receipt he said, "We will put the F.B.I. on the tracks right away. The time I gave him the money, I thought he was a F.B.I. [24] I would not have paid him the money if I did not think that.

There was some conversation with Mr. Haid on his first visit about the ad in the paper. After I paid him the money I realized that if anyone came in who had found the girl they could come on me for collection of the reward, and I said, "What will I do about that?" and he said, "I will take care of that. I can take care of that for you." He did

(Testimony of Laura May Camfield.)

not say he came to see me by reason of the ad in the paper, but he had spoken that the ad was in the paper for \$100.00 cash. I think we talked about the reward, but I do not know whether the ad was mentioned. I believe the ad was removed from the paper the next evening.

When he came to my house the first time he had a picture of my granddaughter, which he said he had gotten from the Sheriff. I did not find out that Mr. Haid was not an FBI agent until Mr. Wilson came to my house. Mr. Haid never found my granddaughter.

Cross Examination

By Mr. Johnson:

Mrs. Sorrel's father and mother are Walter and Bertha Camfield. Walter Camfield is my son.

I believe Walter had gone to the prosecuting attorney's office about his daughter. I talked to Mr. Levy Johnson six weeks or two months later but I did not say anything about Mr. Haid.

I think he took it from his vest pocket. It was something like the badge Mr. Sager showed me. He never said "I am an F. B. I. man." As I paid him the money he said he would put the F.B.I. out on the trail or track. He never ever told me he was working for the Government. He never ever used the words "Special Agent of the Federal Bureau of Investigation."

I don't think he said he was a private detective. I used that word myself. He didn't tell me he had

(Testimony of Laura May Camfield.)

his own Bureau of Investigation. I had asked him before I paid over the money "does the Federal Bureau of Investigation take cases of this kind?" and he said, "Yes, we do." Mr. Kibbe and Mr. and Mrs. Haid were down to see me last Wednesday or Thursday. I didn't tell Mr. Kibbe that the words F. B. I. were not used by Mr. Haid.

On the first occasion Mr. Haid was there, Mrs. Haid sat out in the car. I went out and talked with her. Mr. Haid said that his wife was with him and a much better detective than he was, but she never said a thing.

He never at any time represented to me by word that he was an F. B. I. agent or that he was from the Federal Bureau of Investigation but I asked him if the F. B. I. did this private detective work and he said, "Yes, we do, on occasions." [25] I said "How many F.B.I. private detectives are there in Olympia?" and he said "Three."

Redirect Examination

By Mr. Sager:

Mr. Haid never submitted any written reports to me. Mr. Kibbe, Mr. Haid and Mrs. Haid were down. I did not answer any questions or give them any information. I called Mr. Levi Johnson to find out if Mr. Haid was an F. B. I. man. That was some time after he had been over and I paid the money over. I got leary about him from his remarks and thought he wasn't one and I called Mr. Johnson to find out if he was. [26]

CLARENCE CAMFIELD,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Clarence H. Camfield. I am the husband of Laura Camfield. I was present on April 3rd when Mr. Haid called at our house. He said his name was Haid and he was from the Bureau of Investigation. He showed a badge which is similar to Plaintiff's Exhibit 3. He took the badge out of his pocket, pulled it out like this and said, "This is my badge," but he had his thumb over the top of it. I could not read what was on the badge because I did not have my glasses. He showed us his gun that night. I believe Plaintiff's Exhibit 27 is the gun. At least it was one like it.

Mrs. Camfield asked him how many F.B.I. there were in Olympia and he said there was three. Later on, she asked him if F.B.I.'s would take these cases as he has taken this and he said, "Occasionally we do work for the F.B.I. men. I do not recall now, anything said in respect to the F.B.I.

Q. What did you think Mr. Haid was?

Mr. Johnson: Object to that as being immaterial and incompetent and immaterial.

The Court: Objection overruled, go ahead and answer the question.

A. Well, I wouldn't know what he was. I didn't [27] know what he represented. He didn't tell us anything except Bureau of Investigation. [28]

CLARA GROSS,

a witness called on behalf of the plaintiff, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Clara Gross. I live about four miles west of Olympia. Mr. Walter Camfield lives across the street from me.

My first contact with Mr. Haid was when he called me on the telephone. A lady across the street had run away and left three little children, and they had inserted an ad in the paper. When Mr. Haid called he asked if this was 8788, that was our telephone number. Plaintiff's identification 31 is a copy of the Olympian, dated March 24, 1944. I had seen the ad in this paper prior to the time Mr. Haid called me. The phone number in the ad is my phone number, and it refers to the girl that was missing. When Mr. Haid called he asked information about this girl that had run off and left her children. He wanted to know about it.

He asked me all kinds of questions about it, and I asked him who he was, and he said that he was Mr. Haid from the FBI. After talking quite awhile over the phone he said, "I will be out," and he came out that evening and two or three times after that. This call from Mr. Haid was right after the ad appeared in the paper. When Mr. Haid came to the house my son was there. Mr. Haid showed

(Testimony of Clara Gross.)

me his badge. The badge was either on his coat or on his shirt, and he pulled it back and I saw his gun.

Q. I want to show you Plaintiff's Exhibit 2 and ask you if that is the badge or similar badge to the one he showed you at that time?

A. Well, I couldn't say, but it looks like it. I saw Bureau of Investigation, and I thought it was Federal Bureau of Investigation. It looked like it to me, it had on it Federal Bureau of Investigation.

Mr. Johnson: Object as calling for a conclusion.

The Court: Objection will be overruled.

Mr. Johnson: Exception.

Q. Did you notice the word "Detective" on the badge?

A. He had it pinned on him and I didn't see very close. It looked shinier than it is now. [29]

He asked me all about the girl across the street, Wildabelle Sorrel. Her parents are Mr. and Mrs. Walter Camfield, who live across the street from me. I told Mr. Haid all I knew about her and about her disappearance.

He took his gun out of his holster and my little boy, Bill, saw it and he said, "Well, we have a gun just about like that," and he got our gun and showed it to him. When Mr. Haid showed the gun he said, as I recall, "This is the gun I carry." He said nothing to me about F.B.I. at my home.

(Testimony of Clara Gross.)

Cross Examination

By Mr. Johnson:

When Mr. Haid called me on the telephone he did not say, "This is Mr. Haid of the Haid Detective Bureau," he said, "I work for the F. B. I." He did not say, "This is Haid of the Haid Bureau of Investigation." He used the words FBI. I am definite about that. I am a little hazy whether he mentioned that again. It seems to me when he took out his gun he said, "This is the gun I carry for my business." Before he took his gun out he showed us his star and then he took out his gun and showed the gun. He did not give me his card when he came. He said he was interested in trying to locate this girl, but did not say he had been employed by her parents, or her brother, or sister-in-law.

His badge was not in a little container. It was pinned on him. I saw bureau of investigation on it, and I really thought he was an FBI man. I did not notice the word "Detective" on the badge. I saw "bureau of investigation."

Redirect Examination

By Mr. Sager:

I remember the badge had "Bureau of Investigation." It looks like Plaintiff's Exhibit 3. There were words up above but I did not notice them. [30]

WILLIAM HENRY GROSS,

a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is William Henry Gross. I am 14 years old, and the son of Mrs. Gross who just testified. I was present when Mr. Haid called at our house in the evening. When he came in he introduced himself as Mr. Haid and showed his badge. I was quite away from it and did not see it very good. Pretty soon he pulled his gun, and I said, "I have got a gun just like this" and "Do you want to see it?" We went into the other room and he said, "I use this gun in my business," and I said "What is your business?" and he said "I work for the FBI." He handed me his gun and I saw it was loaded.

Cross Examination

By Mr. Johnson:

My mother was present except when we went into the other room and he said, "I work for the FBI." She was still in the front room. He and I went into the other room alone and when he said, "I use this gun in my business," and I said, "Just what is your business?" He used the words FBI. I am positive of that. He did not say that out in the living room where my mother was.

J. E. STEARNS,

a witness, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is J. E. Stearns. I live at Hicks Lake, near Olympia, and am a deputy sheriff for Thurston County. I have known Mr. Haid a year and a half or two years.

Mr. Haid would come into the office and we would discuss law enforcement work generally. On one occasion he told me he had been working in Texas some sort of Government work. He told me what a rigid course of training and inspection he had to go through in the line of work he was doing in Texas. He said the Government felt he was doing better work for the war effort in Olympia than he was in Texas, but he didn't say what type of work he was doing in Texas.

Cross Examination

By Mr. Johnson:

My experience with him was when he had to come in to the office with reference to cases he was working on as a private detective.

ELLSWORTH WOOD,

a witness, called on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Sager:

My name is Ellsworth Wood. I live at Olympia, Washington. I am a police officer for the Olympia police department. I went to work there January 1, 1944. I am a son-in-law of Mrs. McConkey. I knew Mr. Haid very well. I met him at the Elizabeth Mathwig Dairy farm about the middle of July, 1943, and saw him subsequently from time to time, at my mother-in-law's home. I worked for Mr. Haid. The first time I started on September 2, 1943, and worked nine days. Then September 16 I went to work for him on another job and worked one week. He told me he had worked at Los Angeles in a Navy defense plant before he came up here and that he was working for the Secret Service at this Los Angeles defense plant.

He told me on one occasion, and mentioned it a couple of times later, that he worked for the Army Intelligence in the last war and he was also working in Olympia and was stationed in this district here to work for the Army Intelligence. He generally dressed in what we call Army Officers' Pinks, shirt and pants. The only difference was there was no United States markings on the uniform. It was regular "pinks." Uniform, shoulder holster

(Testimony of Ellsworth Wood.)

straps. There was dual pockets—carried a gun and handcuffs.

I saw his badge. On one occasion out at my mother's home he made a tracing of a badge. He laid a piece of paper across a badge and run back and forth across it with a pencil and it comes through very good, quite plainly and you can see the pattern. Well, that badge was very much like the one I have. Very similar to that. It has a gold center and silver outline on the outer edge. He had a badge similar to Plaintiff's Exhibits 2 and 3, but he also had this badge similar to the one that I carry. I don't recall exactly what was on that badge. He had the badge in a small box between two layers of cotton.

Cross Examination

By Mr. Johnson:

Plaintiff's Exhibit Eleven differs from the badge I carry in my police work in that it is a silver gold-plated badge. Mine is a two-tone with a star at the top. The Washington State Seal is the only similarity. He told me that the badge in the box he had had replated at a jewelry store in Olympia. When I worked for Mr. Haid I carried a gun and on one occasion, handcuffs. I didn't have one of his cards with "Haid's Detective Bureau" on it. The one I had was a blue card "Haid's Bureau of Investigation." It was signed by Murrell F. Haid and on the back it had my identification, my thumb print and my photograph. That is the way I identified myself.

(Testimony of Ellsworth Wood.)

He sent me on various private investigations. To San Francisco on one occasion and over in Chelan County on another. I had cards like defendant's exhibit One. Mr. Haid had written my name on some of them and I was instructed when I went into a house to give them a card and I would say "I am Mr. Wood with the Haid Bureau of Investigation."

Mr. Haid wore an ordinary coat, a double breasted or single breasted. I don't recall any time that he wore a Government coat of any kind. I don't believe I ever saw Mr. Haid in a cap. His shirt was an Army Pink. I refer to them as "pinks" because that is the army name for officers' shirts. The pants that Mr. Haid wore were not slacks. They are typical of those worn by Army commissioned officers. I would say from my observation of them they were regulation Army Pinks but I didn't take a look at the label on them. I would say they were regular commissioned officers' pants—the same type Commissioned Officers wear in the Army—the same collar, the same shape. I was employed by Mr. Haid as a private detective.

Redirect Examination

By Mr. Sager:

Q. What did you think Mr. Haid was?

Mr. Johnson: Improper redirect in the first place, and secondly——

The Court: I doubt whether it is redirect, and he doesn't fix any time, the time when he went to work?

(Testimony of Ellsworth Wood.)

Q. At the time you were working for him——

Mr. Sager: Just a minute, until the Court rules.

Mr. Johnson: May I state the ground of my objection, if the Court please? Objected to on the ground it is purely calling for a conclusion, and it is irrelevant and immaterial so far as the issues in this case are concerned.

The Court: Objection will have to be overruled. Exception allowed.

Mr. Johnson: May I just say one other thing?

The Court: Yes.

Mr. Johnson: There is no testimony here, if the Court please, that he gave his opinion to any one who is alleged to have been defrauded in any count in this indictment.

The Court: That is not the test in a case of this nature. You read the cases——

Mr. Johnson: I read them and I have a different idea of the law.

The Court: This offense is the representation of a public officer, rather than the obtaining of anything of value. He may answer.

Q. Do you remember the question?

A. Will you repeat it?

Q. I asked you what you thought Mr. Haid's business or occupation was?

A. Well, he had already stated to me that he worked for the secret service at Los Angeles. Therefore I drew my conclusions that he was still in the same capacity in Washington that he had been in Los Angeles, because he made the statement that

(Testimony of Ellsworth Wood.)

they had shipped him up here in this district, in the District of Washington for further work up here.

Q. Well, then, what did you think he was?

A. A Secret Service agent or a man from the Federal Bureau of Investigation.

Recross Examination

By Mr. Johnson:

He didn't exactly say anything in my presence which led me to believe he was a Secret Service Agent. The investigations that I went on were hired by private individuals in addition he had some cases in which he worked for the County Sheriff and Mr. Levi Johnson, the Prosecuting Attorney. However, I still thought he was a Secret Service Agent of the Government or a Special Agent of the Federal Bureau of Investigation up until the time I worked for him for approximately a week and then I found out different. That was my opinion of him at that time from his mannerisms, his speech, his actions and the way he conducted himself.

Redirect Examination

By Mr. Sager:

My opinion was also based to some extent on what he told me as to his work with the Army Intelligence and his prior Secret Service work.

(Testimony of Ellsworth Wood.)

Recross Examination

By Mr. Johnson:

He told me he was working for the Army Intelligence now. He never discussed it with me. He was quite secretive about it. The word to describe it, he was quite braggative in his manner. He did tell me he was working for the Intelligence Unit of the United States Army.

During the testimony of the witness, Ralph Mathwig, who was a Government witness on the second day of trial, the following took place:

The Court: Will Counsel step up here a moment.

Now then, for the record, I have been informed during the intermission that one of the jurors, Mrs. McCool, has identified one of the Government witnesses when such witness appeared here in Court, though at the time Mrs. McCool was interrogated, she had no knowledge of her acquaintanceship with such witness, not identifying her by name, and for that reason, I am going to interrogate Mrs. McCool further on voir dire.

Mrs. McCool, you live in Olympia?

Mrs. McCool: Yes, sir.

The Court: And this lady, Mrs. Mathwig, the elderly lady who has not yet testified, do you know her?

Mrs. McCool: I know her, yes.

The Court: Did you know her by name?

Mrs. McCool: I did not. I did not know her name.

The Court: What is the nature of your acquaintanceship?

Mrs. McCool: About eight years ago she came to my house to purchase some chrysanthemum plants, and since then I probably have seen her probably a half a dozen times on the street, and she would ask me how my flowers were, and that is all the acquaintance I have had with her.

The Court: Would that acquaintance in any way be a factor in your acting as a juror in this case?

Mrs. McCool: No, it would not. [31]

The Court: Would you give any greater weight or consideration to her testimony because of the fact that these matters have occurred in the past—that is, the purchase of some plants from you, a speaking acquaintance when you passed, would that cause you to give a greater weight to her testimony than you would to anyone else?

Mrs. McCool: No, it would not.

The Court: Are you sure that you could decide the case upon the evidence just as fairly and impartially as though that occurrence had never taken place?

Mrs. McCool: I certainly could.

The Court: Any questions you want to ask, Mr. Johnson?

Mr. Johnson: No questions I can think of, your Honor.

Mrs. McCool: As far as the case itself is concerned, I have never heard it, only what I have heard in the courtroom here.

The Court: That is all, I just wanted to have the record clear.

Mr. Johnson: May it be understood I may make my motion at a later time—it may be considered at this time so that we won't take time to——

The Court: Yes, now, you may proceed.

And That Thereafter the Following Took Place:

Mr. Johnson: Now, if the Court please, it having come to the attention of the Defendant and his Counsel that one of the jurors was somewhat acquainted, according to the [32] interrogation by the Court, with one of the witnesses, now I move for a mistrial, for the reason and upon the ground that had the Defendant been advised of, or had known that this juror was acquainted with one of the witnesses for the Government, he would have challenged the juror and exercised one of his peremptory challenges.

The Court: I shall have to deny your motion, Mr. Johnson, because the interrogation by the Court made a short time ago, indicates that this juror would in no manner be influenced by reason of this very superficial acquaintanceship she had with a witness. The juror was not even identified by name, when the name was read in voir dire examination of the juror.

It is true that Counsel for the Defendant exercised, I think, only one peremptory challenge, and there is even the probability that Counsel would have exercised a peremptory challenge in this case. I am not prepared to say that they would. This juror, though, under interrogation by the Court,

in every respect qualified as a fair and impartial juror.

However, I do feel that if Counsel for the Defendant and the Defendant are of the opinion that they would desire to proceed with this case with eleven jurors, and waive their Constitutional right to twelve jurors, that I would give consideration to an application to excuse such jurors, but I am not making that as a condition.

Mr. Johnson: If the Court please, I cannot now say to the Court I have any authority to waive any rights, so far as the Defendant is concerned, without consulting him in that regard. [33]

The Court: You may do that during the noon intermission. The Court, however, is perfectly satisfied that this juror is a fair and impartial juror, just as much so as a juror can be, and I would not be warranted in declaring a mistrial. I might even find myself into former jeopardy, because the jury has been sworn to try the cause and empaneled, and the cause has been on trial for two days.

Mr. Johnson: May the record note our exception to the Court's ruling?

The Court: Yes. [34]

At the closing of the Government's case, the following motions were made and proceedings had:

Mr. Johnson: The defendant moves the Court for an order to withdraw from consideration Count One of the indictment—consideration of Count One of the indictment from the jury and dismiss the Count One of the indictment for the reason and

upon the grounds that there is not sufficient evidence submitted to justify the submission of said Count One to the jury, and that there has been a failure of proof on the part of the government to sustain the charge made in Count One of the indictment.

Count Two—I might say I make the same motion as to Count Two; that it be withdrawn from the consideration of the jury, and the count be dismissed.

The same motion as to Count Three.

The same motion as to Count Four.

The same motion as to Count Five.

The same motion as to Count Six; and

The same motion as to Count Seven.

The Court: I am not going to ask you to argue them now, but I think I will let you check up. Well, instead of bringing the jury in at 9:45, I will have the jury brought in about 10:00 or a little after, and give you an opportunity to present concisely. Whatever argument you have that applies to Count One applies on the others, except as to Count Two, that is drawn under a different phase, and I want to say at this time the motion is well taken as to Count Two, but I am not going to definitely decide——

Mr. Sager: Count Seven is also drawn under the other phase of the statute. [35]

The Court: Count Seven alleges that by reason of such assumption and pretense he acquired the camera. I had not noticed Count Seven close enough to make that distinction. Yes, it is, Count Seven does fall under the first subdivision.

Mr. Johnson: I think that is right.

The Court: The proof as to Count Seven, though, Mr. Johnson and Mr. Kibbe, and Mr. Sager, I will state to you is much stronger than the proof on Count Two, but I have carefully made notes and I do not think I will put the Court Reporter to the difficulty of getting out the testimony of the witness on Count Two because I have it pretty carefully noted. However, I would like for the purpose of expediting this, I would like to dispose of these matters before we bring the jury in. Otherwise I shall feel inclined to dispose of them in the presence of the jury, with proper instructions safeguarding it, but I prefer to do it in the absence of the jury.

Mr. Johnson: Will the Court convene at 9:30 or quarter of 10:00?

The Court: Quarter of 10:00, but keep the jury out of the court room. Adjourn court until 9:45 in the morning.

January 5, 1945

Nine-Forty-Five O'clock A. M.

The Court met pursuant to adjournment; all parties present with the exception of the jurors.

The Court: Now, Mr. Johnson.

Mr. Johnson: May it please the Court, with reference to the statement that the Court made, just one other count that I would like to present some

argument to the Court [36] on and that is Count 5. That is the Stuart transaction.

The Court will recall the testimony in the Stuart transaction. It was the testimony that Mrs. McConkey and Mr. and Mrs. Haid and the two children were in the automobile and there was a blow-out and they went into the Signal, I believe, service station to secure a tire. The testimony of Mr. Stuart was that there had been no representation made by Mr. Haid that he was a United States Marshal; that he showed him his badge that he could have taken the badge and could have read it if he so desired, and there was no suggestion that Mr. Haid had withheld the badge in any manner; that he read the badge—the lower part of the badge. Mr. Haid told him that they had been down to Oregon to get the two children and that they were on their way back and they were in need of this tire; that Mr. Stuart further testified that he was primarily interested in selling the tire; that Mr. Haid told him he did not have the ration stamp but because he was a law enforcement officer, I believe the testimony of Stuart was, that he would be able to get the ration stamp and he would send it to him immediately; that the testimony of Stuart I think further was to the effect that he actually did not pay a great deal of attention to the badge, and he was satisfied that he was entitled to a tire, and that Mr. Haid did everything that he said he would do. The question was asked him, however, what he thought—what his opinion was, or what he believed Mr. Haid to be, and he said because he saw the

badge and because these children were being brought back from Portland, he thought he was an agent of the Bureau of Investigation or a Marshal. [37]

Now, it seems to me, if the Court please, that that testimony of Mr. Stuart—and that this is the only testimony so far as this transaction is concerned, is not in any way—does not in any way satisfy the charge in this count. There was no intent in any way to defraud. There was no suggestion, as I see the testimony, of any attempt to defraud. There was no misrepresentation or any pretense, save the fact, however, that Mr. Stuart may have, as he said, didn't pay much attention to it, but he thought he might be an agent of the Bureau of Investigation or United States Marshal seems to me is not sufficient under the charge in this count, nor under the law to submit the matter to the jury.

The Court: I shall have to deny your motion in regard to Count 5, as well as all of the other counts with the exception of Count 2, I think it is, and I will hear from you, Mr. Sager, on Count 2, and an exception will be allowed.

Mr. Sager: Now, your Honor, of course is aware of the fact that Count 2 is brought under the first clause of the statute which makes the ultimate consummation of the offense under that clause in the statute, is taking upon one's self to act in a pretending capacity.

Now, Mrs. Highmiller's testimony is that on the first telephone conversation Mr. Haid said to her, "I have been by order of the Government," or "At the order of the Government, I have been taking

fingerprints.” That likewise during that conversation in the very first telephone conversation, he said, “I can have a party placed down behind the switchboard to check those calls coming to your house,” and she said, “You can’t do that because that is prohibited [38] by the Federal Communications Act.” “Oh,” but he said, “Through my connections I can put a man down there. I cannot hear the conversation, but I can at least find out where the calls are coming from.” That is her testimony—I mean as far as representation goes, of their first telephone conversation.

Now, the Indictment charges—that count of the Indictment charges the overt act to be he took it upon himself to act as such officer, in that he called upon and interviewed the said Gertrude Highmiller. The calling upon her and the interview with her at her home is the alleged overt act in the count. Of course, when he got out to her home there is almost as much misrepresentation, and pretense as to Government employment as has been in many of these other cases. He said to her for one thing, he handled this gun and mentioned to her he had the barrel shortened as a result of Government regulation. I think he said he could have had it done at Ft. Lewis, but they were so busy out there he had it done in Olympia.

He mentioned about the wearing of the Army trousers, although he did not have them on at the time he mentioned how many pairs—he mentioned having been sent here by the Government. He went so far there at her home, she says, “Then you are

with the F. B. I.," and he says, "No, I am not with the F. B. I.," and "Don't misunderstand," and then "But," she says, "You are a Government man," and he said, "Yes."

The Court: I do not have that in my notes at all.

Mr. Sager: I am sure she testified to that, your Honor.

The Court: I have it that he told her that he was [39] conducting an ethical agency.

Mr. Sager: Yes, that is true, too. That was over the first telephone conversation, but at her home, at the time of his visit to her home was, during the general conversation, I am almost positive this was in the testimony or in her evidence, she said, "Then you are with the F. B. I.," or, "You are an F. B. I. man," or something or that sort, and he said, "No, don't misunderstand me, I am not with the F. B. I.," but, she says, "You are a Government man, or with the Government," and he said, "Yes." If there is any question about that, I would like to have the reporter refer to that testimony, but——

The Court: Well, there is a serious question in my mind. I mean, there is all this other misrepresentation there in her presence about his gun being shortened by Government regulation, and my recollection of this witness' testimony was that she was not under the impression at all that he was a Government man. There was nothing said or nothing done or nothing left unsaid that led her to believe that he was a Government man.

Mr. Sager: She did not testify she believed he was a Government man, and I don't think under

whether he assumed or pretended to be a Federal officer.

Mr. Sager: Of course, that will depend upon her statement as to what he said, and I think the transcript will reveal that fact.

The Court: Have you anything further, Mr. Johnson, before the jury are brought in?

Mr. Johnson: I have nothing further.

Mr. Sager: Before the jury is brought in, do you——

Mr. Johnson: Merely for the purpose of the record, note an exception to the Court's ruling. [42]

The Court: Yes. That is, an exception on all counts other than Count 2.

Mr. Johnson: That is right.

* * *

The Court: Now, before we proceed further and take testimony, I desire to state that I just read the transcript that covers Count 2, and from a reading of it I am satisfied that it presents an issue of fact, and will therefore have to rule adversely on your motion, Mr. Johnson.

Mr. Johnson: May the record show an exception?

The Court: Yes. Now, you may proceed. [43]

ROY L. KELLEY,

a witness called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Roy L. Kelley. I am Chief of Police of Olympia, Washington.

I know Mr. Haid. In April, 1943, he came to my office and told me he contemplated opening a detective bureau in Olympia. He said it was to be a private detective bureau. He showed me Plaintiff's Exhibit 2 and 3, which I did not read closely but recall the badge had the words "Haid's Detective and Bureau of Investigation."

I made no objection to his wearing that badge. He carried it in a little leather case. When he showed this badge to me he did not wear it on his person nor on his shirt or coat. He came into my office two or three times a week, during all hours of the day, morning as well as afternoon. He at no time suggested to me that he was an official of the Government or an employee of the Government or that he was doing special work for the army or F. B. I.

I issued a special officer's commission to him. The commission being No. 106. I also issued a permit for him to carry a gun.

I know his general reputation in Olympia to be a law-abiding citizen to be good.

(Testimony of Roy L. Kelley.)

Cross Examination

By Mr. Sager:

I have on occasion talked to Mr. Wilson concerning Mr. Haid. I asked Mr. Wilson to pick up this permit when Mr. Haid was arrested.

Q. And do you remember telling Mr. Wilson that you issued that permit in a moment of weakness, or something to that effect?

A. Yes, I might have.

Q. That is the way you felt about it, wasn't it?

A. At the time, yes.

I reported to Mr. Wilson the incident concerning Mrs. Nelson. I do not recall that I said to Mr. Wilson that Haid was a fraud. Plaintiff's exhibit 2 is very similar to the badge he showed me when he first came to Olympia. I saw plaintiff's exhibit No. 1, later on. Not so long ago. That is not the one he showed me when he first got there.

Mrs. McConkey and Mrs. Highmiller complained to me about Mr. Haid.

Redirect Examination

By Mr. Johnson:

The reason I asked Mr. Wilson to pick up the permit was because Mr. Haid had been indicted.

THOMAS J. TAYLOR,

a witness, called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Thomas J. Taylor and I am a physician and surgeon in Olympia, Washington.

I know that Mr. Haid's reputation for being a law-abiding citizen was good, and I know that his reputation for truth and veracity is good.

Cross Examination

By Mr. Sager:

Shortly after Mr. Haid came to Olympia, I had need of a private detective and asked Mr. Haid to do some investigating for me. I have talked to other people in Olympia about him because when I was going to hire Mr. Haid, I wanted to know that he would be competent and I inquired of the Prosecuting Attorney, Chief of Police and the Attorney General's office and several other people. It was upon those reports that I state his reputation is good.

Redirect Examination

By Mr. Johnson:

He never made any representation to me that he was connected with the Government. [46]

Recross Examination

By Mr. Sager:

I never saw him dressed in army clothes. He wore a brown pair of pants and a brown jacket and I would not say that he ever wore any army clothes.

LELAND P. BROWN,

a witness, called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Leland P. Brown and I am Superintendent of Schools in Olympia.

I first met Mr. Haid in my office in Olympia in January, 1944. He fingerprinted about 2200 children in the school. This was a voluntary service on Mr. Haid's part and he never made any representations that he was a special agent for the Federal Bureau of Investigation but made it very clear that he was not. He never at any time represented himself to be anything but a private detective. [48]

BERTHA CAMFIELD,

a witness, called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Bertha Camfield. I am the daughter-in-law of Laura Camfield and the mother of Wildabelle Sorrel.

The first time I saw Mr. Haid was when he came to our place. At that time he gave me his card

(Testimony of Bertha Camfield.)

which is similar to Defendant's Exhibit A-1. He said he thought he could find our daughter.

He didn't say anything about Haid's Detective Bureau other than to give me his card. But he didn't say anything about being connected with the Government, or with the Federal Bureau of Investigation or anything of that character. I gave him a picture of her at that time. Once later he came out with a girl named Vi. He asked where my mother-in-law was, I think, or where their place was or something as near as I can recall. He made some reports to my husband.

Cross Examination

By Mr. Sager:

We live in the house where my daughter had lived at the time she disappeared, which is just across the road from Mrs. Gross' place.

My husband was called to Mrs. Gross' several times in response to telephone calls from Mr. Haid.

The time Mr. Haid and Vi came out to see me and asked about my mother-in-law they then went to find her. She was not at home when he went to see her. He was trying to find her and she was not at home.

WALTER CAMFIELD,

a witness, called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Walter Camfield. I am the father of Wildabelle Sorrel and the son of Laura and Clarence Camfield.

The first time I talked to Mr. Haid was on the telephone. Before that time I had been to the Prosecuting Attorney's office concerning my daughter. The first telephone call I had with him, he called over Mrs. Gross' telephone and said, "This is Mr. Haid of the Haid's Detective Bureau." He said he had seen the ad in the paper and wanted to know if I was her father and I said "yes." I told him I was interested in locating my daughter but was not interested in paying him the reward. My mother and son-in-law were doing that. I told him where he could locate my mother. I had several conversations with him after that and he made several reports to me. Said he had found a girl in Shelton answering my daughter's description but found later that it was not my daughter. He also told me he had been to Aberdeen on a hot tip and it was a false alarm. He reported to me once or twice a week for about two months. I gave pictures of my daughter to the Sheriff's office.

(Testimony of Walter Camfield.)

Cross Examination

By Mr. Sager:

Mr. Haid's reports were oral and made over the telephone and at my home. The first time he called me was [50] through Mrs. Gross' telephone. He did not say anything about working on the case to get a reward. He said he was interested in working on the case. He told me he had seen the ad in the paper. The first time he did not ask for any compensation or employment. I told him he would have to see my mother. She was the one who would pay the reward and I told him where my mother lived.

Whereupon Plaintiff's Exhibit 31 for identification was offered and admitted in evidence and marked Plaintiff's Exhibit No. 31.

I have been to Mr. Haid's office and saw a lot of fingerprint cards. He said he did a lot of work for the Government for Mr. Hoover at that time.

Q. Now, did you ever talk to your mother about this matter of Mr. Haid?

A. Naturally I would.

Q. How did she refer to Mr. Haid?

A. How did she refer to him?

Mr. Johnson: I object to that as being purely hearsay.

The Court: Objection will be overruled.

Mr. Johnson: How his mother referred to him out of the presence of the defendant?

The Court: Objection will be overruled, Mr. Johnson, exception allowed.

(Testimony of Walter Camfield.)

The Witness: Shall I answer that question?

The Court: Yes.

A. Okeh, she would always refer to him as a detective of the F.B.I. [51]

Redirect Examination

By Mr. Johnson:

I don't know who the fingerprints belong to. I believe he said, he was getting them out for Mr. Hoover. That was the only reference made to the fingerprints. I believe it was in March, 1944. The statement that my mother made about the Mr. Haid of the F.B.I. was made out of the presence of the Defendant.

Q. I mean, Mr. Haid was not present when your mother made that statement. A. No.

Mr. Johnson: That is all.

For the purpose of the record, I move that the statement that was made by the mother to him, how she referred to Mr. Haid to him out of the presence of the defendant, be stricken on the ground and for the reason it is hearsay.

The Court: The motion will be denied and exception allowed. [52]

LEVY JOHNSON,

a witness, called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Levy Johnson and I am the acting

(Testimony of Levy Johnson.)

Prosecuting Attorney of Thurston County and have been such since the first part of 1943.

I have known Mr. Haid for nearly two years. When he first came to Olympia, he called on me and said he was opening a private detective agency in Olympia. Immediately thereafter he opened a private detective agency and he left some of his cards with me. Cards being the same as Defendant's Exhibit A-1.

I have seen the letter heads he used in his business. On two occasions he has done work for my office for which he was compensated and he gave a little assistance on other occasions. He was doing work for my office at the time this indictment was returned. He was doing some confidential work for me. At that time he was working in connection with a Federal Agency that I know of.

I know Mrs. Ruth McConkey and about the work he did in reference to the Mathwig children. Mrs. McConkey referred to him as a private detective and I told her if she hired Mr. Haid, she would have to pay him. I made it very clear to her that he was a private detective and that he was the same as any other private citizen. She would have to pay him for his services. I had several conversations in reference to the Mathwig children and he sent me written reports concerning his investigation. [53]

Defendant's Exhibit A-11 are some of the reports he made to me.

He worked on that case for a considerable pe-

(Testimony of Levy Johnson.)

riod of time. 30 days or so or probably more. A dependency hearing was had in reference to the children of evidence secured by Mr. Haid. An order was entered by the Superior Court for the delivery of the children who had been located in Portland and the Court instructed me to see that they were brought back to Olympia and a conference was held in my office between Mrs. Haid, Mr. Haid and Mrs. McConkey. I told Mr. Haid he could go for them and could say that he was representing my office and to contact the authorities in Portland.

He went to Portland and brought the children back. That was on August 17, 1943.

She referred to Mr. Haid at times and said that private detectives were expensive and cost plenty.

I know Walter Camfield who was in my office in reference to Wildabelle Sorrel. We had issued a warrant for her in the fall of 1943. This was issued after Mr. Camfield was in my office. One of the Camfields, I don't remember which one, spoke about a private detective. I talked to Mr. Haid on several occasions about the Sorrel case I mentioned that Walter Camfield was an old friend of mine and to go out and talk to him.

Mrs. Laura Camfield never called and asked if Mr. Haid was a F. B. I. man.

Mr. Haid did wear some light brown trousers but never wore a uniform of any kind and was always dressed in a business suit. Mr. Haid did wear some light brown trousers but I don't think they could

(Testimony of Levy Johnson.)

have been mistaken for army trousers. He wore a brown shirt but it was not like an army [54] shirt.

Mr. and Mrs. Haid worked on the Woodruff case and in connection therewith was requested to call the Pharmaceutical laboratory in St. Louis. I know his reputation for being a law-abiding citizen is good and his general reputation for truth and veracity is good.

Cross Examination

By Mr. Sager:

The Woodruff case was a criminal prosecution. Mr. Haid was employed by my office to investigate it. There was no connection between the Woodruff case and the Mathwig case. I believe the call to St. Louis was in December, 1943. We paid Mr. Haid for his work on the Woodruff case, including his expenses and his expenses would include the telephone call to the Pharmaceutical Company at St. Louis. That would not be a proper charge against the Mathwigs.

I referred the Camfield case to him. I did not know that a reward had been posted.

The case that he was working on at the time of the indictment started originally in my office. We figured it was really Federal work, and I asked Mr. Haid to take the evidence which he had secured, to the proper department in Seattle and submit it, and he did, and the department phoned me and then took over the case, and they asked Mr.

(Testimony of Levy Johnson.)

Haid to continue with them, as I understand. He was not working for the Federal Agency.

It was a matter that involved both Federal and State jurisdiction.

I believe I saw Mrs. McConkey before I knew Mr. Haid. She had been in to see me four or five times before going to see Mr. Haid and the dependency proceeding was a matter properly within the jurisdiction of my office.

I told Mr. Haid that when he got to Portland, that if he had any difficulty there, he could say that he was [55] representing my office I did not give him any credentials. [56]

WILMA D. HAID,

a witness, called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Wilma D. Haid. I am the wife of Murrell F. Haid, the defendant. We have three children of the ages of six, eleven and twelve. We live in Olympia about two and a half years. We came from Los Angeles.

Mr. Haid worked as a guard at the Norris Stamping Company. Immediately before that, for the Navy Department at the Navy base near San Diego, as a guard. Before that he worked in Texas. We,

(Testimony of Wilma D. Haid.)

at one time operated a Detective Agency at Wichita Falls, Texas, for about two years, 1940 to 1942. It was called "Haid's Bureau of Investigation.

I have seen Plaintiff's Exhibit 2 and 3. We used them in Texas. The star in the center is there because most of the law enforcement officers at any point in Texas use a star on their badge as Texas is the lone star state. They were used for about three or four months in Olympia.

We left California because of my husband's health. The first place we lived at in Olympia was in the house we rented from Mrs. Lillibridge. No statement was made by Mr. Haid to Mrs. Lillibridge that he was in any way connected with the army. We lived in the Lillibridge house for about six months. We told Mrs. Lillibridge that we were opening a private detective agency and gave her the information for a special listing of "Haid's Detective Bureau." She made arrangement for the installation of the telephone. At no time did Mr. Haid tell Mrs. Lillibridge that he was [57] employed by the Government. I presume we did make a statement about having the house wired. We and our children kid one another and we may have said we had the house wired, but if we did it was only in jest.

When we first arrived in Olympia, we called on the Chief of Police, Mayor, Prosecuting Attorney's office and advised them that we were opening a private detective agency. We advertised in the newspapers.

(Testimony of Wilma D. Haid.)

Defendant's Exhibit A-2 is the ad we carried in the newspaper. Defendant's Exhibit A-1 is the cards we used as business cards. In addition to the newspaper, we ran an advertisement over a radio station, KGY.

We were called by Mrs McConkey and she stated that she had seen our ad in the newspaper and wanted us to do some work for her, in reference to her brother's two children. We went out to her house and she explained what she wanted. Thereafter we called on her many times. She called us on the phone many times and we submitted written reports to her in reference to our investigation of the Mathwig children. We also consulted with her attorney and the Prosecuting Attorney.

Defendant's E-11 are some of the reports we submitted.

We employed someone in Los Angeles in this investigation and statements were taken there. And on one occasion we went to Portland, after a hearing in Superior Court, to get the children. We were advised by the Prosecuting Attorney if we got into any difficulty in Portland about the children to call his office and were authorized to state that we were representing his office. Mrs. McConkey went with us.

On the return trip from Portland, we had a blow-out near Woodland and we stopped at Mr. Stuart's gas station for a new tire. Mr. Haid pulled out his folder which is Defendant's [58] Exhibit A-3, in which he carried a blue card and his badge. The

(Testimony of Wilma D. Haid.)

badge was similar to Plaintiff's Exhibit 2 and 3. There was nothing said by Mr. Stuart in which the words, Government marshal or F. B. I. were used. We received the tire from Mr Stuart and later sent him a ration certificate to cover it.

I knew Ralph Mathwig and his mother, Elizabeth Mathwig.

My husband never wore any Army pinks.

Q. These trousers he had were what?

A. They were uniform trousers from the——

Q. They were what?

A. They were trousers that he wore when he was a guard.

The light brown or tan trousers which Mr. Haid wore were purchased at a department store and so was the brown shirt. He always wore a regular suit coat and a civilian hat. The cap that appears in the picture on his identification card is not an Army cap. It was the uniform that the auxiliary military police wore down there. That is when that picture was taken.

Mrs. Mathwig told us about the unfinished hospital building and wanted to know if there was any way we could help her in getting the Government to complete the building. Mr. Haid said he would do what he could to offer the hospital to the Government on her behalf. We were not to receive any compensation for this work but Mrs. Mathwig was to pay the expenses. Mr. Haid told her the reason he was willing to do that was because he

(Testimony of Wilma D. Haid.)

had two sons and one daughter in the armed services.

We called Mr. Haid's father in St. Louis, Missouri, believing that he would help us with Senator Clark. We contacted Senator Clark at Washington, D. C., and Senator Wallgren.

Q. Now, which Champ Clark, do you mean, the father or the son?

A. This was the father.

Defendant's Exhibit A-14 and plaintiff's 24 and 25 is some of the correspondence. These letters were shown to Ralph Mathwig and his mother. Some pictures were taken of the building and were sent to Washington. [59]

An estimate of \$300.00 had been secured by Ralph Mathwig for the drawing of the plans. Mr. Haid suggested that he could get them drawn cheaper than that so he called Mr. Brown of Los Angeles, who said he would draw it for \$120.00. Later we paid him \$85.00 for the sketches and the blue prints. One set of the sketches and blue prints was sent to Washington, D C., one to Captain Mathwig and one to Elizabeth Mathwig. I believe Mrs. Mathwig paid for expenses, approximately \$195.00. I made up the statement which is Plaintiff's Exhibit 23 from our ledger sheets. I made a mistake in the cost of the call, \$6.20, that was made on December 15th. That should not have been in the bill. The statement is correct except for the \$6.20.

There was some information that Margaret Mathwig had been a user of narcotics and when we ad-

(Testimony of Wilma D. Haid.)

vised Mrs. Mathwig of that fact, she opened up Captain Mathwig's safe and took out a box of drugs which she asked us to look over. Both Ralph Mathwig and his mother said they had no use for these drugs and we did not know what they were. They wanted to get rid of them and we offered to dispose of the drugs and so we turned them over to Mr. Ed Sharpe.

He told us that they were of no use and had thrown most of them away. Neither Mr. Haid or I received any credit or goods for these drugs.

Mr. Haid said he was a Government man and could take these drugs. I never ever saw Mr Haid have a badge at the Mathwig place with the inscription "Department of Justice." Mr. Haid always carried the badge he had in his folder and never wore it on his coat or shirt. Mr. Haid never in my presence made the statement to the Mathwig's [60] that he was a Government man or supervisor at Fort Lewis.

We purchased one radio from Mr. Mathwig. The other two did not play so he gave them to us. He was told that we would attempt to repair them and give them to our children. They were in very poor condition.

Mr. Haid never made the statement that Fort Lewis had told him to pick up old radios.

I, at one time gave Mrs. Mathwig some red ration points. Mr. Haid never gave her any red points. I always carried the ration book. There may have been something said in jest at that time

(Testimony of Wilma D. Haid.)

by Mrs. Mathwig about our being government people giving away red stamps. I don't remember.

Mr. Haid bought his handcuffs a few months after we came to Olympia and did not have handcuffs before that. He later sold them to Elsworth Wood.

The first time we went to the Camfield's, I stayed in the car. Mr. Haid went into the house. I saw Mrs. Camfield on that occasion when she came out to the car. Mr. Haid told her that I worked with him on his investigations and was a better detective than he was. We called on Mrs. Walter Camfield in reference to the disappearance of her daughter, Mrs. Sorrel. Before we went to the Bertha Camfield house, we had no information concerning the reward advertisement in the paper. She told us they would not be able to finance finding the daughter, but that her mother-in-law, Mrs. Laura Camfield, had placed an ad in the paper as to \$100.00 reward. She asked if we would go and see her mother-in-law.

We also talked to Mr. Walter Camfield. Mr. Haid introduced himself to Walter Camfield as follows: "This is Haid of Haid's Detective Bureau of Investigation." We did considerable work on the Sorrel case, securing pictures of her, sending them to various law enforcement officers between Olympia and Los Angeles. We contacted a number of her acquaintances in Olympia, went to Shelton and Bremerton. We had information that she was in Bakersfield, California, and [61] conveyed that

(Testimony of Wilma D. Haid.)

information to the Camfield's. We located a girl in Shelton who answered her description but found out that it was not Mrs. Sorrel. We worked about four months on that case. At no time was the words F.B.I. ever used by Mrs. Laura Camfield.

Cross Examination

By Mr. Sager:

Q. Mrs. Haid, I understood you to say yesterday before the afternoon recess that Senator Clarke was the elder Clarke, the father?

A. I misunderstood Mr. Johnson's question. I thought he was asking about was it Mr. Haid or Mr. Haid's father.

When we operated in Texas I believe our letterhead was Haid's Bureau of Investigation. I don't recall whether it was Haid Detective Personal and Identification Bureau. The name of the bureau was Haid's Bureau of Investigation. The reports we sent to Mrs. McConkey from time to time are not on our letterhead, and our statements to Mrs. McConkey (defendant's Exhibit A-8) are not on our letterhead. They were accompanied by letters.

I made up the statement (plaintiff's exhibit 23) for Mr. Wilson on his second visit to our home. On his first visit he had requested us to submit vouchers in support of the items on our ledger sheet. I don't remember if I showed him the vouchers, but they were there. The vouchers consisted of the telephone bills received from the company. He had

(Testimony of Wilma D. Haid.)

asked for the vouchers because there was some question about the ledger sheet. Plaintiff's exhibit 23 is an accurate statement of expenses incurred by us for Mrs. Mathwig except one item.

Plaintiff's exhibits 14, 15 and 16 are statements we sent to Mrs. Elizabeth Mathwig. These bills were all paid. The first statement we sent to her, plaintiff's exhibit 14, is for \$170.31, it contains the item of \$120.00 for architect's fee. I remember that our ledger sheet had two items for the architect, an original one of \$50.00 and a later one of \$45.00 and then an additional \$10 for the plans and blue prints, making a total of \$105.00. The two items for architect's fees included a few other additional expenses. The \$25.00 item for gasoline and oil shown on plaintiff's 23 was not on the ledger sheet. We lumped that in with the telephone calls. The telephone calls shown on the ledger sheet included on occasions several telephone calls and gasoline and oil. We just put the gasoline and oil in with the telephone calls.

In connection with the Mathwig matter Mr. Haid first contacted his father in St. Louis. At a later date we contacted Senator Wallgren, and he asked for plans and specifications or blue prints on the hospital. We contacted Senator Wallgren by both mail and telephone. The telephone charges are shown on this exhibit (plaintiff's 23). After he asked for the blue prints we suggested to the Mathwigs that they could probably be obtained cheaper from Mr. Brown and then we wrote Mr. Brown and

(Testimony of Wilma D. Haid.)

told him what we wanted. We first telephoned him. Our first contact with Senator Wallgren was by telephone. In our first letter to Mr. Brown we enclosed a cashier's check for \$50.00. At a later time we sent him \$35.00. Plaintiff's exhibits 19 and 20 are letters we sent to Mr. Brown. Our first letter to him is dated July 2, 1943. According to plaintiff's exhibit 23 our first telephone conversation with Senator Wallgren was July 3, which would be after we wrote Mr. Brown asking for plans. I am not mistaken when I say Senator Wallgren asked us to get the plans before we took it up with Mr. Brown, but the dates of this statement, plaintiff's 23, and this letter, plaintiff's 19, do not bear me out, but it was at his request that we got them.

We were not to charge Mrs. Mathwig for our services, but were to be reimbursed for our expense. We never charged any of the hours on the Elizabeth Mathwig matter to Mrs. McConkey, although plaintiff's exhibit 8 contains the statement, "Mrs. McConkey, we have spent considerable time on the matter your mother took up with us and we have run a little of that time in with the time spent on the original matter." That doesn't mean we were charging for the time. The "original matter" was the McConkey matter. We knew Mrs. McConkey was acting in behalf of Captain Mathwig. We submitted statements to her about twice a month and they were paid promptly. The McConkey employment was our first employment in Olympia.

(Testimony of Wilma D. Haid.)

We did some work for Mrs. McConkey personally after August, 1943. Plaintiff's exhibit 7 shows the period of time for that work. It is dated January, 1943, but it should be January, 1944. It is the first statement we sent Mrs. McConkey for this additional work. It does not show any dollars or cents on it. The only time we sent a bill for this extra work was in June of 1944. In January or February, 1944, when Captain Mathwig was home, there was a conversation between him and Mrs. McConkey and us concerning the \$100.00 we had borrowed from her. At that time she asked for payment. We offered to give her a note for it, despite the fact that she owed us \$163.00 for this extra work. At one time Mrs. Mathwig asked us to pay her note and we told her we would pay her whenever her daughter paid us, so we were holding off both these loans, \$100.00 to Mrs. McConkey and \$175.00 to Mrs. Mathwig, against the \$163.00 which Mrs. McConkey owed us.

Redirect Examination

By Mr. Johnson:

I never kept any accurate record of the gas and oil expended in the Mathwig matter. We expended a lot more for gas and oil than we put on the bill. Our first work was the McConkey, Mathwig matter.

MURRELL F. HAID,

a witness called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Murrell F. Haid. I am the defendant in this action.

Immediately before coming to Olympia, I was employed by the Norris Stamp Manufacturing & Stamping Company of Los Angeles, where I was a guard.

Defendant's Exhibit A-15 is a certificate of meritorious conduct from the Auxiliary Military Police of the United States Army.

Prior to that I was employed by the United States Navy as a guard at the new Navy base in Oceanside, California, where I worked approximately nine months to a year.

Prior to that I worked at the Ryan Aircraft Corporation at San Diego, as a guard and prior to that I operated the "Haid's Bureau of Investigation" at Wichita Falls, Texas.

Defendant's Exhibit A-26 are my transfer orders from one Naval District to another.

Defendant's Exhibit A-27 are my police cards issued to me by the police chief at Wichita Falls.

I operated a private detective agency there for approximately two years and used Plaintiff's Exhibit 2 and 3 in the operation of that business. We also used them in Olympia.

(Testimony of Murrell F. Haid.)

Q. Mr. Haid, are there other detective bureaus, private detective bureaus which use the word "Bureau of [64] Investigation?"

Mr. Sager: I object to the question.

Mr. Johnson: Well, the purpose of it is, your Honor, to show it is a common thing and I have an exhibit that I want to introduce, of the classified ad section of the telephone book to show there is a number.

The Court: The specific charge is not using the word Bureau of Investigation. It is only a series of action. I think I shall have to sustain the objection, Mr. Johnson.

Mr. Johnson: Exception, your Honor.

Plaintiff's Exhibit 1 and 11 are the badges we now use. I have used them since August, 1944.

When we arrived in Olympia we stayed in an auto camp and then rented the cabin of Mrs. Lillibridge's. No statement was ever made by me to her that I was an employee of the Government.

We have three children, six, eleven and twelve, and I have five children by another marriage. Two of my sons and one daughter is in the service.

I think something was said in jest that the house was wired in front of the children during one of Mrs. Lillibridge's visits, but it was more of a jest of the children than anything else.

I never owned any army pinks or army shirt. I do own a pair of tan slacks and a brown shirt, which I purchased in a department store in Los Angeles. I never wore a cap in Olympia. The pic-

(Testimony of Murrell F. Haid.)

ture on Exhibit 22 was taken when I was employed by the Norris Stamping Company of Los Angeles and was purchased in a department store. It is not in any way similar to an army cap. [65]

In the spring of 1944, I finger printed approximately 2500 school children on cards furnished by the Federal Bureau of Investigation and sent them to the Federal Bureau of Investigation at Washington, D. C.

Defendant's Exhibit A-28 for identification is a news item regarding the proposed plan of taking the finger prints.

The same was offered in evidence and admitted without objection and marked Defendant's Exhibit A-28.

I met Mrs. McConkey about the 23rd of April, 1943, and was employed by her as a private detective to investigate the matter of Margaret Mathwig and the Mathwig children. I never represented to her that I was in any manner connected with the army or was employed in any capacity with the Government.

I made a trip to Portland with her and Mrs. Haid with the purpose of returning the two Mathwig children on a Court order issued by a Superior Court of the State of Washington and for Thurston County. I was authorized by Levy Johnson, Prosecuting Attorney of Thurston County, to inform the authorities in Oregon that we were representing his office.

On the way down I had a blow-out and I stopped

(Testimony of Murrell F. Haid.)

someone with my badge. I had tried to stop several cars previously, and no luck. So, I used the badge to stop another motorist. I explained to him our predicament, let him read my badge and identification card, and he was more than willing to help us in getting going again.

I had correspondence with Captain Mathwig and Defendant's Exhibit A-29 for identification are letters and telegrams which were sent to Captain Mathwig.

Whereupon the same was offered and admitted in evidence without objection and marked Defendant's Exhibit A-29.

Defendant's Exhibit A-30 for identification are the letters I received from Captain Mathwig. [66]

The same were offered and admitted without objection and marked Defendant's Exhibit A-30.

On the way back from Portland, we had a flat tire and stopped at Mr. Stuart's garage. I informed him that we needed a tire and presented my private detective credentials which consisted of badge, Plaintiff's Exhibit 2 or 3 which read Haid's Bureau of Investigation and a blue card showing my name and business. He had a full opportunity to examine my badge and identification card.

I told him we had been to Oregon to secure the children, and had no ration certificate to purchase a tire, but that if he desired I would phone the secretary of our ration board to confirm that I would be given a ration certificate upon my return to

(Testimony of Murrell F. Haid.)

Olympia to cover him on a sale of a tire to me, in order to get the children home that night.

Q. What did he say to that?

A. He said he would, he said he would take that chance.

I never made any statement to him that I was a United States Marshal or a Special Agent of the Department of Justice or the Bureau of Investigation. I never in any way represented myself to be an officer or an employee of the United States. I never heard him make any statement to the effect that if the Government got after him, he probably would have to go after one of Uncle Sam's men.

I never had any intention to defraud Mr. Stuart. I paid for the tire and sent him the ration certificate as I promised.

I had borrowed \$100.00 from Mrs. McConkey, offered to give her a note and told her we would repay her as soon as [67] we got our money from an outstanding account in San Francisco. We later did some work for Mrs. McConkey on which she owes us \$163.00. I have never paid her the \$100.00 and she has not paid the \$163.00 she owes me.

I know Mrs. Elizabeth Mathwig and I tried to assist her in offering the incomplete hospital building to the Government and in furtherance of the offer, I phoned my father who was a friend of Senator Clark in Missouri and phoned Senator Wallgren on several occasions and had some correspondence with him. At the suggestion of Senator Wallgren, I took some photographs and sent to him

(Testimony of Murrell F. Haid.)

and secured the services of Mr. Elmer Brown of Los Angeles to draw a sketch, plans and blue prints for which I paid him \$85.00. We were not to be paid for our work but were to be reimbursed for any expenses that were incurred. That is all we received from the Mathwig's.

I had no intention to defraud Mrs. Mathwig or Ralph Mathwig, her son. I saw Mrs. Elizabeth Mathwig on several occasions during the investigation of the Mathwig children and I did say to her in a jesting manner, we would handcuff her to the bed so she could sleep. I did on one occasion when Ralph Mathwig asked me what kind of a gun I carried, show him my gun. I never made the statement that I had the gun cut down at Fort Lewis.

Defendant's Exhibit A-31 for identification is the check I gave Mr. Lutch for changing the barrel on my gun.

The same was offered and admitted without objection and marked Defendant's Exhibit A-31.

I never did display a badge with the inscription "Department of Justice." I have never owned such a badge. [68]

It had been suspected that Margaret Mathwig had been a user of drugs. This information was known to Mrs. Mathwig and she showed us the box of drugs and asked us to dispose of them and I took them to Ed Sharpe's pharmacy and asked him to dispose of them. I received no money or credit for the drugs from Ed Sharpe.

I did receive some radios from Ralph Mathwig.

(Testimony of Murrell F. Haid.)

I paid for one of them and two of them were of no value whatsoever and he gave them to me. I did not tell him that Fort Lewis had told me to pick up old radios. I never ever told Ralph Mathwig that I was employed by the Government or worked for the Army or that I held any office in the Government or that I was a Special Agent of the Federal Bureau of Investigation.

I know Mr. and Mrs. Walter Camfield. I met them about the 1st of April, 1944, when I went to see them at the suggestion of Mr. Levy Johnson, concerning the disappearance of Wildabelle Sorrel. On my first visit, I met Mrs. Camfield. Prior to that time I had not seen this ad in the Olympia paper with reference to the reward. We first heard about it from Mrs. Camfield. I introduced myself as Haid from Haid's Detective Bureau and gave her one of my cards. The first contact I had with Mr. Camfield was over the telephone which was after my visit to the Camfield home and I introduced myself as Haid of the Haid's Detective Bureau. He said his mother was taking care of the financial end and suggested that I see her. He gave me her address and Mrs. Haid and I went out to see Mrs. Laura Camfield, his mother, and she agreed to pay us \$100.00 for our efforts to locate Wildabelle Sorrel. In my conversation with Mrs. Laura Camfield, no mention was ever made of the F.B.I., nor were the words F.B.I. ever used. She did ask me how many detectives there [69] were in Olympia and I told her three, my wife, Hollis

(Testimony of Murrell F. Haid.)

Fultz and myself. I never had any intention whatsoever to defraud Mrs. Camfield and we did considerable work to locate Wildabelle Sorrel.

I am acquainted with Mrs. Gross. My first conversation with her was over the telephone. I told her I was Mr. Haid of Haid's Detective Bureau and contacted her for the purpose of securing information regarding Wildabelle Sorrel. I was at her home on one occasion and on that occasion I introduced myself to her as Haid of Haid's Detective Bureau and showed her my identification card and badge. I showed her boy my gun when he asked me if I was a real detective and if I carried a gun. I never made any statement concerning the F.B.I. or were the words F.B.I. used.

I turned over all my files in the Mathwig and McConkey cases to Mr. Wilson of the Federal Bureau of Investigation.

Cross Examination

By Mr. Sager:

I was convicted once on a misdemeanor in California on a N.S.F. check.

Before coming to Olympia I was employed by the Norris Stamp Company as a guard and as a guard for the Navy-Marine base at Oceanside and was employed by the corporation and not by the Government.

I wore a uniform which consisted of a shirt, trousers and octagon shaped cap. The pictures on my credentials were taken when I was working as a

(Testimony of Murrell F. Haid.)

guard in California. [70] We occasionally take pictures in our work. I did not take my own picture to use in these credentials because we did not have a camera. I am still using the same picture on my credentials.

We changed our badge and card after Mr. Wilson first called on me. We changed our identification card from Bureau of Investigation to Detective Bureau because there are certain classes of people that don't construe the word "investigation" with "detective" work. We were after business and that was one of the reasons we changed it. We talked with Mr. Wilson about the effect of the phrase "Bureau of Investigation" on our credential card and I told him that in war time I could see where that might be confusing. I may have ordered the new cards the night or evening after the first call of Mr. Wilson, but I had been conversing with the printer regarding new identification cards prior to Mr. Wilson's visit. We sent copies of the finger prints we took of the children in Olympia to the Federal Bureau of Investigation. It is common practice for any agency taking finger prints to send them in to the Federal Bureau of Investigation. No special permission is needed from the bureau to take finger prints and send them in.

Q. Now, on your first—by the way, on this trip down to Portland, and I understand from your testimony you had this flat tire on the way down and you attempted to stop several passing motorists to get a jack? A. Yes.

(Testimony of Murrell F. Haid.)

Q. And didn't have success? A. No.

Q. And then you held out this badge and flagged them down with the badge? A. Yes, sir.

Q. And that worked? A. Yes, sir.

Q. Why did you pull out the badge to flag them down, Mr. Haid?

A. That was one means of stopping a motorist, explaining to him or her, whichever the case may have been, our predicament and getting assistance by using the jack, and being on our way.

Q. How did you think the badge would aid in stopping a motorist when your other efforts had been unsuccessful?

A. Well, the badge is indicative of a law enforcement officer.

Q. And that is what you were attempting to represent, were you not?

A. I was a special officer of the City of Olympia.

Q. But, you pulled out the badge to stop passing motorists, and used the badge to indicate you were some law enforcement officer?

A. To receive assistance.

Q. Is that right? You did not think the passing motorist would observe you with merely a private detective badge when you flashed the badge?

A. I didn't think he could observe I was any special type of an officer at all.

Q. Your authority to go down to Portland through Mr. Levy Johnson, did not give you au-

(Testimony of Murrell F. Haid.)

thority to regulate traffic or stop anybody on the highway?

A. I was not trying to regulate traffic.

Mr. Johnson: Object.

The Court: Objection overruled.

Q. You were trying to stop passing motorists?

A. I was trying to gain assistance.

Q. By using your badge? A. Certainly.

During the conversation with Mr. Stuart, I told him we had been in Oregon to pick up the children and I showed him my credentials.

We received some information from Los Angeles that Margaret Mathwig had been a user of drugs. I informed Mrs. Mathwig and she showed me the box of drugs that came out of the safe. I gave them to Mr. Sharpe and I asked him to dispose of them as he saw fit. He was a druggist and was in a better position to do that, than I. Mrs. Mathwig had asked me to dispose of them and not leave them on the farm. I had examined the drugs but I knew nothing about them. [71]

Plaintiff's exhibits 14, 15 and 16 are statements to Mrs. Mathwig and they represent the entire charges to her. The first one is for \$170.00, the next one is for \$18.80, and the last one is \$7.75. The total being roughly \$197.00, and plaintiff's exhibit 23 is intended to cover the same expense. This was made up by us at Mr. Wilson's request to verify the items on our ledger sheet. It was given to Mr. Wilson as a corrected account on the Mathwig deal. The last of our bills to Mrs. Mathwig (plaintiff's exhibit

(Testimony of Murrell F. Haid.)

16) is dated August 1, 1943, and that was the last item of expense to her. There are six items on this yellow sheet, plaintiff's 23, which bear dates subsequent to August 1. The only explanation I can give as to how these six items dated subsequent to August 1 could be incorporated in the three statements, which all preceded August 1, is that there would be a typographical error on the date. The McConkey file was turned over to Mr. Breckenridge of the Federal Bureau of Investigation. I gave Mrs. McConkey a statement for her income tax.

Redirect Examination

By Mr. Johnson:

When Mr. Vargo arrested me, he and Mr. Breckenridge searched through all my files and took whatever they desired. [72]

P. C. KIBBE,

a witness, called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is P. C. Kibbe. I live at Tenino and I am regularly licensed to practice law in the State of Washington. I have practiced law in the State since 1899.

(Testimony of P. C. Kibbe.)

About a week ago I called on Mr. and Mrs. Camfield. I asked her the question "Were the words F. B. I. ever used by Mr. Haid in her conversation with him," and she answered, "there had not been." She also stated that Mr. Haid never represented himself to be an F. B. I. agent.

Cross Examination

By Mr. Sager:

I have known Mr. Haid for about a year and a half and employed him on a few occasions.

He has shown me his blue credential card.

Q. Do you remember a conversation he had with you at one time when he showed you this blue card and said he thought he had better have Bureau of Investigation changed.

A. Yes, he did tell me that. He said he was afraid that it—well, he thought it would be better for his business to change that, and I guess it was partly at my suggestion because I approved it, that he did it.

Q. Well, he thought it would be better for his business, didn't he, because he said they might confuse that with the Government?

A. No, I don't think so.

Q. And if they did, they might not pay him his fee?

A. No, nothing of that kind ever discussed.

He never said that he should change his name because they might confuse it with the Government. That was not discussed. I never made any

(Testimony of P. C. Kibbe.)

statement to Mr. Wilson in reference to the change of name of Mr. Haid's business. [73]

Redirect Examination

By Mr. Johnson:

When Mr. Wilson called on me, I gave him a full showing of cases that I had had for Mr. Haid and all the cards that he had given me.

I told Mr. Wilson that Mr. Haid had introduced himself to me as Haid of Haid's Detective Bureau.

JOSEPH RICHARD GIBBONS,

a witness, called on behalf of the defendant, after having been duly sworn, testified as follows:

Direct Examination

By Mr. Johnson:

My name is Joseph Richard Gibbons and I am manager of the telephone office at Olympia. Defendant's exhibit A-18 is the original record of the telephone company in connection with Olympia telephone number 31F2. The record indicates that that 'phone number was assigned to Mr. Haid. The application for that number was made by a person who signed it Mary Gowan Lillibridge.

Cross Examination

By Mr. Sager:

As far as Mr. Haid's service is concerned the number was later changed to Olympia 5700. That is at a different address and a different telephone. This exhibit is Mr. Haid's record card. [74]

At the close of all the testimony, the following proceedings were had and motions made.

Mr. Johnson: I would like to renew my motions as made at the close of the Government case as to each count, individually, and it may be understood the motion is made as to each count.

The Court: It will be so understood. The motion is denied and exceptions allowed, and you may adjourn court until ten o'clock Monday morning.

Copy of Appellant's Proposed Bill of Exceptions received this 1st day of September, 1945.

J. CHARLES DENNIS,
District Attorney
HARRY SAGER,
Assistant U S. District
Attorney. [75]

United States District Court, Western District of
Washington, Southern Division

No. 15668

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MURRELL F. HAID,
Defendant.

CERTIFICATE

I, Charles H. Leavy, United States District
Judge, sitting as judge of the United States District

Court for the Western District of Washington, Southern Division, and the judge before whom the trial above-entitled cause was conducted, do hereby certify:

That the attached Bill of Exceptions, consisting of the Appellant's Proposed Bill of Exceptions in one volume, and the Appellee's Proposed Amendments to the Appellant's Bill of Exceptions in one volume, contain all of the proceedings had, all of the evidence offered, admitted or adduced at the trial of said cause, together with all exceptions taken, which are applicable to the question raised upon this appeal, and said Bill of Exceptions, as amended, is hereby settled, allowed, certified, and filed as a true and correct Bill of Exceptions in said cause, and is hereby made a part of the record therein.

Done in Open Court this 15th day of November, 1945.

CHARLES H. LEAVY,

United States District Judge.

[Endorsed]: Filed Nov. 15, 1945.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 15668

UNITED STATES OF AMERICA,

Respondent,

vs.

MURRELL F. HAID,

Appellant.

ASSIGNMENT OF ERRORS

The appellant, Murrell F. Haid, hereby respectfully says, that in the record of the proceedings before the District Court for the Western District of Washington, Southern Division, before whom the above cause was tried, manifest errors occurred to his prejudice, and that he hereby assigns the following errors, which he avers occurred:

1. That the District Court erred in admitting in evidence, over the objection of the defendant, and erred in refusing to grant the motion to strike the testimony of the witness Stuart on the grounds that the same was incompetent and opinion evidence and not within the issues of the indictment on Count 5.

Q. (By Mr. Sager): Did he say anything to you about being a Government man?

A. Well, I am not going to state that he said he was a Government man right out, but he made indications to believe—I thought he was a Government man from his identifications from the Bureau

of Investigation. That was the first anything has been said about the Government.

Mr. Johnson: If the Court please, I move that be stricken and I object to the question, for the reason that we are charged in the Indictment with having represented to be a United States Marshal, and obviously, in view of the answer now of the witness, that is not in conformity with the charge with which we have been charged.

Mr. Sager: We will get to that.

Mr. Johnson: I think we are entitled to have strict proof on it.

The Court: Your motion will be denied at this time.

Mr. Johnson: Exception.

Q. Did you believe he was a Government man?

A. I did.

Mr. Kibbe: Now, I move that be stricken, what he believed. What Mr. Haid had told him is the only thing that would justify that, what he believed. He might believe I was President of the United States and I would not be.

The Court: I think the rule would be different, Mr Kibbe, in this particular charge on this count—where this is one of the counts. I shall have to overrule your objection and allow you an exception.

Q. What was your belief as to what capacity and what he was acting as, as a Government man?

A. Well, my belief, if I seen a star, would mean a man was a law enforcement officer, and naturally bound to be a marshal or police of some kind. I

think anybody with any common reason would think the same thing.

Q. What was your actual thought about it, what did you think he was?

A. I thought he was a marshal.

Mr. Johnson: May my objection go to all this testimony?

The Court: Yes.

A. (Continuing): From the reading on his badge, and that is all I paid any attention to, that part of the badge convinced me in selling the tire in truth he was a Government man.

Q. What did you say?

A. I figured he was a marshal, naturally.

2. That the District Court erred in admitting in evidence over the objection of the defendant, that the same was incompetent and opinion evidence the testimony of the witness Ralph Mathwig:

Q. (By Mr. Sager): Mr. Mathwig, what did you believe of Mr. Haid's capacity—or,—

Mr. Johnson: If the Court please, object to that, on the ground that it is incompetent and not the proper basis on which—that the testimony is purely a matter of opinion, and the ultimate question to determine is what the facts were, and that matter is for the jury to determine.

The Court: Yes, the jury will finally have to determine the question of whether or not this person parted with any property or anything on the belief and on the representation of—what he believes of course is not conclusive of what the fac-

tual matter is or was. However, he may answer the question and exception allowed.

Mr. Johnson: Exception.

Q. The question is, Mr. Mathwig, what did you believe Mr. Haid to be?

A. Well, after Mr. Haid asked me whether my sister had told me about whether he worked for the Government or not, and he showed me the badge, why I took him for a Government employee.

Q. You took him for what?

A. I took him for a Government employee.

Q. Did you take him for any particular Government employee?

A. By the badge, I took him he represented the F. B. I.

Q. The words "Department of Justice" suggested that to you? A. Yes sir.

Q. Would you have let him take these drugs if you had not thought he was a Government man?

A. No, I would not, because I figured we would be responsible.

3. The District Court erred in admitting in evidence over the objection of the defendant and erred in denying the motion to strike testimony of the witness Elizabeth Mathwig:

Q. (By Mr. Sager): Did Mr. Haid tell you why he was examining the drugs?

A. Well, he gave us to understand that he was a Government man.

Mr. Johnson: I move that be stricken.

Q. Well, what did he say?

Mr. Johnson: Just a moment.

A. That is so long ago——

Mr. Johnson: Just a minute, Mrs. Mathwig.

The Court: I will overrule your objection, Mr. Johnson.

A. I couldn't tell you the exact words.

Mr. Johnson: Exception.

4. The District Court erred in admitting in evidence over the objection of the defendant, the same as incompetent and calling for a conclusion the testimony of Elizabeth Mathwig.

Q. (By Mr. Sager): What did you believe as to Mr. Haid's occupation or employment?

Mr. Johnson: Just a minute.

A. Well——

Mr. Sager: Just a moment.

Mr. Johnson: There is no testimony here whatsoever that Mr. Haid made any representation to Mrs. Mathwig concerning his being connected with the Government in any degree, and certainly now she may have formed an impression of what somebody else may have told her. That now, is not competent evidence and is objected to on that ground.

The Court: Of course, she will understand—the witness understand what she believed or what she thought at that time, and not what she thinks now. The question is limited to that extent. The objection will be overruled and exception allowed.

Q. At the time, Mrs. Mathwig—at the time Mr. Haid was coming out to your place, what did you believe was his occupation?

A. That he was a Government man.

Q. Would you have permitted him to take the drugs if you had not believed him to be a Government man?

Mr. Johnson: Object to that.

A. No, I wouldn't.

The Court: Whenever there is an objection, you wait.

Mr. Johnson: Object to this on the basis there is no testimony now in evidence, so far as Mrs. Mathwig is concerned, of any impression she received from Mr. Haid himself or any misrepresentations on his part as to the fact that he was not—that he was employed by the Government in any confidential capacity.

The Court: Objection will be overruled, Mr. Johnson. Exception allowed.

Q. Would you have entered into this arrangement with him for the attempt to reconvert the hospital if you had not thought he was a Government man?

Mr. Johnson: Object to that, if the Court please, on the same ground.

The Court: Same ruling.

A. No, you wouldn't do this to a perfect stranger.

Q. Would you have loaned him the \$170 on the note? A. No, I wouldn't, neither.

Mr. Johnson: Same objection.

The Court: Same ruling.

5. The District Court erred in admitting in evi-

dence over the objection of the defendant, the same was incompetent and calling for conclusion of the testimony of the witness Clara Gross:

Q. (By Mr. Sager): I want to show you Plaintiff's Exhibit 2 and ask you if that is the badge or similar badge to the one he showed you at that time?

A. Well, I couldn't say, but it looks like it. I saw Bureau of Investigation, and I thought it was Federal Bureau of Investigation. It looked like it to me, it had on it Federal Bureau of Investigation.

Mr. Johnson: Object as calling for a conclusion.

The Court: Objection will be overruled.

Mr. Johnson: Exception.

6. The District Court erred in admitting in evidence over the objection of the defendant that the same was incompetent and hearsay, the testimony of the witness Walter Camfield.

Q. (By Mr. Sager): Now, did you ever talk to your mother about this matter of Mr. Haid?

A. Naturally I would.

Q. How did she refer to Mr. Haid?

A. How did she refer to him?

Mr. Johnson: I object to that as being purely hearsay.

The Court: Objection will be overruled.

Mr. Johnson: How his mother referred to him out of the presence of the defendant?

The Court: Objection will be overruled, Mr. Johnson, exception allowed.

The Witness: Shall I answer that question?

The Court: Yes.

A. Okeh, she would always refer to him as a detective of the F. B. I.

* * *

Q. I mean, Mr. Haid was not present when your mother made that statement. A. No.

7. That the District Court erred in denying the following motions made by the defendant at the close of the Government's case to-wit:

Mr. Johnson: The defendant moves the Court for an order to withdraw from consideration Count One of the indictment—consideration of Count One of the indictment from the jury and dismiss the Count One of the indictment for the reason and upon the grounds that there is not sufficient evidence submitted to justify the submission of said Count One to the jury, and that there has been a failure of proof on the part of the government to sustain the charge made in Count One of the indictment.

Count Two—I might say I make the same motion as to Count Two; that it be withdrawn from the consideration of the jury, and the count be dismissed.

The same motion as to Count Three.

The same motion as to Count Four.

The same motion as to Count Five.

The same motion as to Count Six; and

The same motion as to Count Seven.

The Court: I am not going to ask you to argue them now, but I think I will let you check up. Well, instead of bringing the jury in at 9:45, I will have the jury brought in about 10:00 or a little after, and give you an opportunity to present concisely. Whatever argument you have that applies to Count One applies on the others, except as to Count Two, that is drawn under a different phase, and I want to say at this time the motion is well taken as Count Two, but I am not going to definitely decide——

Mr. Sager: Count Seven is also drawn under the other phase of the statute.

The Court: Count Seven alleges that by reason of such assumption and pretense he acquired the camera. I had not noticed Count Seven close enough to make that distinction. Yes, it is, Count Seven does fall under the first subdivision.

Mr. Johnson: I think that is right.

The Court: The proof as to Count Seven, though, Mr. Johnson and Mr. Kibbe, and Mr. Sager, I will state to you is much stronger than the proof on Count Two, but I have carefully made notes and I do not think I will put the Court Reporter to the difficulty of getting out the testimony of the witness on Count Two because I have it pretty carefully noted. However, I would like for the purpose of expediting this, I would like to dispose of these matters before we bring the jury in. Otherwise I shall feel inclined to dispose of them in the presence of the jury, with proper in-

structions safeguarding it, but I prefer to do it in the absence of the jury.

* * *

Mr. Johnson: May it please the Court, with reference to the statement that the Court made, just one other count that I would like to present some argument to the Court on and that is Count 5. That is the Stuart transaction.

* * *

The Court: I shall have to deny your motion in regard to Count 5, as well as all of the other counts with the exception of Count 2, I think it is, and I will hear from you, Mr. Sager, on Count 2, and an exception will be allowed.

* * *

The Court: Now, before we proceed further and take testimony, I desire to state that I just read the transcript that covers Count 2, and from a reading of it I am satisfied that it presents an issue of fact, and will therefore have to rule adversely on your motion, Mr. Johnson.

Mr. Johnson: May the record show an exception.

The Court: Yes, now, you may proceed.

8. The District Court erred in refusing to grant the defendant's motions as made at the close of all the testimony as follows, to-wit:

Mr. Johnson: I would like to renew my motions as made at the close of the Government case as to each count, individually, and it may be understood the motion is made as to each count.

The Court: It will be so understood. The motion is denied and exceptions allowed, and you may adjourn court until ten o'clock Monday morning.

9. That the District Court erred in refusing to grant the defendant's motion for a new trial.

10. That the District Court erred in refusing to grant the motion of the defendant for a mistrial when advised that one of the jurors was acquainted with one of the Government witnesses at the time the following took place:

The Court: Will Counsel step up here a moment.

Now, then, for the record, I have been informed during the intermission that one of the jurors, Mrs. McCool, has identified one of the Government witnesses when such witness appeared here in Court, though at the time Mrs. McCool was interrogated, she had no knowledge of her acquaintanceship with such witness, not identifying her by name and for that reason, I am going to interrogate Mrs. McCool further on voir dire.

Mrs. McCool, you live in Olympia?

Mrs. McCool: Yes, sir.

The Court: And this lady, Mrs. Mathwig, the elderly lady who has not yet testified, do you know her?

Mrs. McCool: I know her, yes.

The Court: Did you know her by name?

Mrs. McCool: I did not. I did not know her name.

The Court: What is the nature of your acquaintanceship?

Mrs. McCool: About eight years ago she came to my house to purchase some chrysanthemum plants, and since then I probably have seen her probably a half a dozen times on the street, and she would ask me how my flowers were, and that is all the acquaintance I have had with her.

The Court: Would that acquaintance in any way be a factor in your acting as a juror in this case?

Mrs. McCool: No, it would not.

The Court: Would you give any greater weight or consideration to her testimony because of the fact that these matters have occurred in the past—that is, the purchase of some plants from you, a speaking acquaintance when you passed, would that cause you to give greater weight to her testimony than you would to anyone else?

Mrs. McCool: No, it would not.

The Court: Are you sure that you could decide the case upon the evidence just as fairly and impartially as though that occurrence had never taken place?

Mrs. McCool: I certainly could.

The Court: Any questions you want to ask, Mr. Johnson?

Mr. Johnson: No questions I can think of, your Honor.

Mrs. McCool: As far as the case itself is concerned, I have never heard it, only what I have heard in the courtroom here.

The Court: That is all, I just wanted to have the record clear.

Mr. Johnson: May it be understood I may make my motion at a later time—it may be considered at this time so that we won't take time to——

The Court: Yes, now, you may proceed.

And That Thereafter the Following Took Place:

Mr. Johnson: Now, if the Court please, it having come to the attention of the Defendant and his Counsel that one of the jurors was somewhat acquainted, according to the interrogation by the Court, with one of the witnesses, now I move for a mistrial, for the reason and upon the ground that had the Defendant been advised of, or had known that this juror was acquainted with one of the witnesses for the Government, he would have challenged the juror and exercised one of his peremptory challenges.

The Court: I shall have to deny your motion, Mr. Johnson, because the interrogation by the Court made a short time ago, indicates that this juror would in no manner be influenced by reason of this very superficial acquaintanceship she had with a witness. The juror was not even identified by name, when the name was read in voir dire examination of the juror.

It is true that Counsel for the Defendant exercised, I think, only one peremptory challenge, and there is even the probability that Counsel would have exercised a peremptory challenge in this case. I am not prepared to say that they would. This juror, though, under interrogation by the Court,

in every respect qualified as a fair and impartial juror.

However, I do feel that if Counsel for the Defendant and the Defendant are of the opinion that they would desire to proceed with this case with eleven jurors, and waive their Constitutional right to twelve jurors, that I would give consideration to an application to excuse such juror, but I am not making that as a condition.

Mr. Johnson: If the Court please, I cannot now say to the Court I have any authority to waive any rights, so far as the Defendant is concerned, without consulting him in that regard.

The Court: You may do that during the noon intermission. The Court, however, is perfectly satisfied that this juror is a fair and impartial juror, just as much so as a juror can be, and I would not be warranted in declaring a mistrial. I might even find myself thrust into former jeopardy, because the jury has been sworn to try the cause and empaneled, and the cause has been on trial for two days.

Mr. Johnson: May the record note our exception to the Court's ruling?

The Court: Yes.

Respectfully submitted,

BERTIL E. JOHNSON,

Attorney for Murrell F. Haid, Defendant-Appellant herein.

Copy of Assignment of Errors received this 1st day of September, 1945.

J. CHARLES DENNIS,

District Attorney.

HARRY SAGER,

Assistant Attorney.

[Endorsed]: Filed Sept. 1, 1945.

[Endorsed]: No. 10978. United States Circuit Court of Appeals for the Ninth Circuit. Murrell F. Haid, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed: January 31, 1946.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10978

MURRELL F. HAID,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

Comes now the appellant and adopts his Assignments of Error heretofore filed herein as his points on appeal.

/s/ BERTIL E. JOHNSON,
Attorney for Appellant.

Copy received this 8th day of February, 1946.

J. CHARLES DENNIS,
United States Attorney.

By FRANK HALE,
Assistant U. S. Attorney.

[Endorsed]: Filed February 11, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER ELIMINATING EXHIBITS FROM
PRINTED TRANSCRIPT

Good cause therefor appearing, It Is Ordered that the original exhibits in above cause need not be printed in the printed transcript of record, but will be considered by the Court in their original form.

FRANCIS A. GARRECHT,

Senior United States Circuit

Judge.

Dated: San Francisco, Calif., Feb. 13, 1946.

[Endorsed]: Filed February 13, 1946. Paul P.
O'Brien, Clerk.

In The United States
Circuit Court of Appeals
For the Ninth Circuit

MURRELL F. HAID,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BERTIL E. JOHNSON,
Attorney for Appellant.

Office and Post Office Address:

505 Rust Building, Tacoma 2, Washington.

In The United States
Circuit Court of Appeals
For the Ninth Circuit

MURRELL F. HAID,

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VS.

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Brief of Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED
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In The United States
Circuit Court of Appeals
For the Ninth Circuit

MURRELL F. HAID,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

STATEMENT CONCERNING JURISDICTION

The appellant was indicted (Tr. 2) on seven counts of violation of Section 76, Title 18, United States Code, and convicted on three counts and acquitted on four counts. The jurisdiction of the United States District Court is sustained by provisions of Title 28, Section 41, of the United States Code Annotated, and the jurisdiction of this Court by the provisions of Title 28, Section 723 (a), United States Code Annotated, and the rules promulgated by the Supreme Court of the United States pursuant thereto.

ABSTRACT OF THE CASE

The appellant was charged by indictment for seven violations of Section 76, Title 18, United States Code.

The jury, by its verdict, found the appellant guilty of Counts III, IV and V of the indictment and not guilty as to Counts I, II, VI and VII.

The indictment by Count I (Tr. 3) charged that the appellant between April 1, 1943, and December 31, 1943, did knowingly, wilfully, unlawfully and feloniously, and with intent to defraud Ruth McConkey and the United States of America, falsely assume and pretend to be an officer and employee of the United States of America, did demand and obtain from the said Ruth McConkey things of value, to-wit: employment and sums of money.

Count II (Tr. 3) charged that the appellant, in the months of January and February, 1944, did knowingly, wilfully, unlawfully and feloniously, with intent to defraud Gertrude Highmiller and the United States of America, falsely assume and pretend to be an officer and employee of the United States, acting under the authority thereof, did take it upon himself to act as such, in that he called upon and interviewed the said Gertrude Highmiller.

Count III (Tr. 4) charged that the appellant, between April 1, 1943, and December 31, 1943, did unlawfully, wilfully, knowingly and feloniously, with intent to defraud Elizabeth Mathwig and Ralph Mathwig and the United States of America, falsely assume and pretend to be an officer and employee of the United States, acting under authority thereof,

to-wit: Special Agent, Federal Bureau of Investigation, Department of Justice, and while acting as such did demand and obtain from them things of value, to-wit: drugs and certain sums of money.

Count IV (Tr. 5) charged that the appellant, on or about April 3, 1944, did knowingly, wilfully, unlawfully and feloniously, with intent to defraud C. H. Camfield and Laura Camfield and the United States of America, did falsely assume and pretend to be an officer and employee of the United States, acting under authority thereof, to-wit: a Special Agent, Federal Bureau of Investigation, and acting in such pretended character, did demand and obtain from them money in the sum of \$100.00.

Count V (Tr. 5) charged the appellant, on or about August 3, 1943, did knowingly, wilfully, unlawfully and feloniously, with intent to defraud Everett Stuart and the United States of America, did falsely assume and pretend to be an officer and employee of the United States, acting under the authority thereof, to-wit: a United States Marshal, and acting in such pretended character, did then and there demand and obtain from him certain things of value, to-wit: automobile tire and tube without surrendering a ration certificate.

Count VI (Tr. 6) charged the appellant, during the month of April, 1943, did, with intent to defraud Mrs. Mary Lillibridge and the United States of America, falsely assume and pretend to be an officer and employee of the United States, acting under the authority thereof, to-wit: a Special Agent, Federal

Bureau of Investigation, Department of Justice, and acting in such pretended character, did demand and obtain from her the rental and occupancy of a residence and the installation and use of a telephone.

Count VII (Tr. 7) charged the appellant, on or about June 1, 1944, and July 31, 1944, with intent to defraud S. Irene Nelson and the United States of America, did falsely assume and pretend to be an officer and employee of the United States of America, acting under the authority thereof, to-wit: Special Agent, Federal Bureau of Investigation, Department of Justice, and did take it upon himself to act as such officer and employee in that he ordered and purchased from her a camera for use in his assumed and pretended office and employment.

EVIDENCE

The evidence, so far as this appeal is concerned, may be briefly stated as follows:

Murrell F. Haid was operating in the City of Olympia, Washington, during the period charged, as a private detective, under the name and style "Haid Bureau of Investigation." (Tr. 163). Prior to his residence in Olympia, he had been employed by the Norris Stamp Manufacturing Company of Los Angeles as a guard, and received for his services a certificate of meritorious conduct from the Auxiliary Military Police of the United States Army. (Tr. 163).

Prior thereto, he was employed as a guard by the United States Navy at Oceanside, California, the

Ryan Aircraft Corporation of San Diego, California, as a guard, and prior to that operated "Haid Bureau of Investigation," Wichita Falls, Texas. He is a married man, father of eight children (Tr. 164). His wife accompanied him on many occasions and was associated with him in his business.

The Government appellee here introduced in evidence, in support of its charges that he was employed by Mrs. Ruth McConkey, as a private investigator (Tr. 46) to make investigations and secure evidence in reference to the care and welfare of the minor children of her brother, Captain Mathwig. She testified, as did practically every other witness, that the appellant wore handcuffs, carried a gun, wore a badge which carried the word "investigation" (Tr. 36, 37, 39) and presented her with an identification card. She further testified that the appellant represented that he was an under cover man (Tr. 36), had been sent up here by the Government and usually worked until noon of each day at Fort Lewis; (Tr. 37) that he wore army clothes, not like her brother's, but her brother was a captain; appellant's clothes were gray with pinkish cast, army shirt, with short jacket like bus drivers wear (Tr. 37); that his private detective work was only a cover up (Tr. 38); that he went on a trip to Portland, where he secured the children, stopped a car by exhibiting his badge (Tr. 40) and on the way back from Portland stopped at a gas station at Woodland, where Everett Stuart was employed, and secured a tire and tube (Tr. 40). This is the same Everett Stuart named in Count VI of the indictment. She further testified

that she paid the appellant for his services in the investigation concerning the children \$1225.64 (Tr. 42) and made him a loan of \$100.00, which he never repaid (Tr. 42). During the direct testimony of Mrs. McConkey, the Court, over objection of appellant's counsel, permitted the said witness to testify (Tr. 45) :

“Q. Now Mrs. McConkey, did you believe that he (appellant) was a Government employee?

“A. Yes, I would say I did.

“Q. Did your belief that he was a Government man in any way influence your transactions?

“A. Yes.”

On cross-examination, Mrs. McConkey admitted that she hired him as a private detective (Tr. 46). Appellant, during his testimony, denied making any statement that he was employed by the Government in his conversations with Mrs. McConkey. The jury apparently disbelieved Mrs. McConkey, because it acquitted the appellant on Count I.

In support of its charge on Count II, the Government's (appellee's) witness, Mrs. Highmiller, testified that appellant called her on the 'phone, stating that someone had called him about her and suggested he send his card to Dr. Highmiller. (Tr. 89). He (appellant) called later and asked if he could come to the house to discuss some business with her and that it was arranged that he come out the next eve-

ning (Tr. 91). He came out, showed his gun and explained he had had it cut down on Government orders. (Tr. 91). She said, "Oh, then you are an F.B.I. man." and he (appellant) said, "No, don't misunderstand me, I am not an F.B.I. man," but he went on to say he was doing some sort of special work for the Government at Fort Lewis (Tr. 92). She further testified that appellant said he had been sent up by the Government (Tr. 92); that he did not ask her for anything and she paid him nothing (Tr. 93). The jury acquitted appellant on this count.

In support of Count III. The testimony on the part of the witness for the Government (appellee), Mrs. Elizabeth Mathwig and her son, Ralph Mathwig, testified that they met the appellant while he was making the investigation on the Mathwig children (Tr. 69, 77); that Ralph Mathwig was the brother of Ruth McConkey, and Elizabeth Mathwig was the mother of Ruth McConkey, Ralph Mathwig, and Capt. Mathwig (Tr. 68, 77).

When Haid first came to see Ralph Mathwig, he (Haid) said, "I am Haid of Haid's Detective Agency" (Tr. 69). On one occasion appellant showed a badge which had inscribed the words, "Issued by the Department of Justice" (Tr. 69). On another occasion, appellant was examining some drugs, because Margaret Mathwig was thought to be using narcotics, which he said he was going to take to Fort Lewis to have examined; that he had a right to take the drugs because he was a Government man (Tr. 70). On another occasion, appellant said, "He had re-

ceived word from Fort Lewis to pick up radios" (Tr. 71); that Ralph and his mother had a hospital building only partially completed, and that appellant said he knew Senator Wallgren and had connections in Washington and could assist in persuading the Government to take over the hospital building and complete it (Tr. 71-72). Haid was to receive nothing for his work, but was to be reimbursed for his expenses.

During the testimony of Ralph Mathwig, the Court, over the objection of appellant's counsel, permitted Ralph to testify as follows (Tr. 73):

"Q. The question is, Mr. Mathwig, what did you believe Mr. Haid to be?

"A. Well, after Mr. Haid asked me whether my sister had told me about whether he worked for the Government or not, and he showed me the badge, why I took him for a Government employee.

"Q. You took him for that?

"A. I took him for a Government employee.

"Q. Did you take him for any particular Government employee?

"A. By the badge, I took him he represented the F.B.I.

"Q. The words "Department of Justice" suggested that to you?

"A. Yes, sir.

"Q. Would you have let him take these drugs if you had not thought he was a Government man?

“A. No, I would not, because I figured we would be responsible.

“Q. If you had not thought him to be a government man, would you have entered into this agreement with Mr. Haid with respect to the proposal on the hospital?

“A. No, I don't think we would have.”

Elizabeth Mathwig's testimony was very similar to that of her son, Ralph (Tr. 76-82), although she did add that she saw him (appellant) in Army clothes (Tr. 77); never saw his gun, but did see his handcuffs; on one occasion gave her some meat points; that he came and took the drug (Tr. 78); that she made a loan to him of \$170.00, for which he gave a promissory note (Tr. 79).

During the testimony of Elizabeth Mathwig, the Court, over the objection of appellant's counsel, permitted her to testify as follows (Tr. 81):

“Q. At the time, Mrs. Mathwig—at the time Mr. Haid was coming out to your place, what did you believe was his occupation?

“A. That he was a Government man.”

The appellant denied having made any representations to Ralph Mathwig or Elizabeth Mathwig that he was an officer or employee of the United States, and testified he tried to assist in the completion of the hospital building only as a friendly gesture, and because he had two children of his own in the service of the United States; that the money he received was for expenses only and that

the \$170.00 was a loan for which he gave a promissory note (Tr. 168). He further testified that he never ever even showed Ralph Mathwig a badge with the inscription "Department of Justice," and that he never ever owned one with such inscription (Tr. 168); that he was asked to dispose of the drugs, which he did (Tr. 168); that he never ever told Ralph Mathwig he worked for the Government or was an F.B.I. (Tr. 169).

In support of Count IV, the Government (appellee) submitted testimony to the effect that Laura May Camfield and her husband, Clarence, were the grandparents of Wildabelle Sorrel and the mother and father of Walter Camfield. Walter Camfield was the father of Wildabelle Sorrel. Mrs. Sorrel had left Olympia and her whereabouts were unknown, and her parents and grandparents were endeavoring to locate her. Laura May Camfield had placed an ad in the Olympia papers offering a reward of \$100.00 to anyone locating Mrs. Sorrel (Ex. 31). About a week later, the appellant came to her home, and introduced himself as "Mr. Haid" (Tr. 112), said he was from the Bureau of Investigation, showed his badge, and by reason of the manner in which he held it she only saw "Bureau of Investigation" on the lower part of it. He said he was a private detective, and Mrs. Camfield asked, "How many F.B.I.'s and private detectives are there in Olympia?" and he answered, "Three." (Tr. 113). After Haid (appellant) had questioned her about Mrs. Sorrel, Mrs. Camfield said "Does the F.B.I. and private detectives take cases of this kind?" and appellant answered, "Yes,

we do.” (Tr. 113). Appellant was given the \$100.00 in advance. Later in the conversation, Mrs. Camfield asked appellant, “How does the F.B.I. go about finding anyone like this?” and Appellant answered, “Oh, we have ways of finding them” (Tr. 114). Mrs. Camfield saw him on two occasions when he gave her some information concerning Mrs. Sorrel (Tr. 114). Mr. Camfield testified as follows (Tr. 117):

“Q. What did you think Mr. Haid was?

“A. Well, I wouldn’t know what he was. I didn’t know what he represented. He didn’t tell us anything except Bureau of Investigation.”

The Defendant showed by evidence that appellant had called on Walter Camfield and his wife, Bertha Camfield, handed them his card (Ex. A-1) (Tr. 145). They testified appellant did not say anything about being connected with the Government or with the Federal Bureau of Investigation (Tr. 145). Appellant called Mr. Walter Camfield and introduced himself as “Haid of Haid’s Detective Bureau” (Tr. 146). Walter Camfield told appellant where he (appellant) could locate Laura May Camfield (Tr. 146). Appellant made several reports concerning Wildabelle Sorrel to Walter Camfield. The appellant denied having represented himself in any other manner than as a private detective (Tr. 169); that he first contacted Mrs. Camfield at the suggestion of Levy Johnson, the acting Prosecuting Attorney of Thurston County (Tr. 169). Levy Johnson testified that he had suggested that appellant contact the Camfield family (Tr. 150).

During the cross-examination of Walter Camfield, the Court permitted him to testify, over the objection of appellant's counsel, that he had talked to his mother, out of the presence of the appellant, and that during the conversation she had referred to appellant as "a detective of the F.B.I." (Tr. 147-148).

In support of Count V, the appellee submitted the testimony of Everett Stuart, who stated substantially that: he was a service station operator at Woodland, Washington; that on August 17, 1943, appellant stopped at his station and requested a tube and tire (Tr. 60); that there was one woman and two children in the car; that he said he had been to Oregon to seize the two children from their mother, who had taken them to Portland; that in case of emergency, the law enforcing officer could get tires (Tr. 60-61); that he had no tire certificate, but would secure one when he returned to Olympia; that he did send the certificate as he had promised; that appellant showed a badge similar to Ex. 2; that there was some writing on the badge, and all he noticed was "Bureau of Investigation" (Tr. 60); that he showed some credentials in a folder, but Stuart did not read them; that during the conversation Stuart said, "Well, I am going to let you have the tire since I don't believe Uncle Sam will put one of his own men in jail" (Tr. 61). Over objection of Appellant's counsel, the Court permitted Stuart to testify as follows: "Well, I am not going to state that he said he was a Government man right out, but he made indications to believe—I thought he was a Government man from his identifications from

the Bureau of Investigation" (Tr. 62); and again on further questioning by counsel for appellee, and over objection of appellant, the Court permitted Stuart to testify as follows:

"Q. Did you believe he was a Government man?

"A. I did.

"Q. What was your actual thought about it, what did you think he was?

A. I thought he was a marshal."

On cross-examination, Stuart testified, "I did not ask him and he did not tell me what special office he held. I was selling him a tire for which I got paid. Mine was a business transaction. He did everything he told me he would do, and the deal was wound up as far as I was concerned. I let him have those things to do what I could to get the children back.

* * * I do not remember his stating definitely what office he held or what capacity of the office or who he worked for. All I know was that he was a law enforcement officer." (Tr. 65).

Appellant testified that he showed Stuart his credentials (Ex. A) and his badge (Ex. 2 or 3); told Stuart they had been to Portland to secure the children and that he had no ration certificate but would secure one when he reached Olympia, which he did (Tr. 166); that he made no statement that he was a United States Marshal or Special Agent of the Bureau of Investigation (Tr. 167). Other evidence submitted showed that appellant had gone to Port-

land to secure the children from their mother on instructions of the acting Prosecuting Attorney of Thurston County, and was authorized to say he was representing the Prosecuting Attorney's office (Tr. 150).

In support of Count VI, the testimony on behalf of the appellee showed that appellant on arriving from California went to the home of Mrs. Lillibridge in search of living quarters, and was informed by her that she had expected officers (Tr. 104); that Appellant stated he was in the employ of the Government, and that she (Mrs. Lillibridge) would be doing as much a service to the country in having him as in having Army officers (Tr. 104-105); that appellant represented his work was confidential; that he needed a telephone, and a telephone was secured; that he was interested in fingerprinting; that she believed him to be a member of the F.B.I., and that she arrived at the belief because he wore a uniform type of clothes, because of his conversation about investigations and Government assignments (Tr. 106). He said he was not a member of the F.B.I. but was working directly with them (Tr. 107).

The evidence showed that Mrs. Lillibridge had secured a telephone listing for appellant under "Haid's Detective Bureau" (Defendant's Ex. 18) (Tr. 176). The jury found appellant not guilty on this count.

In support of Count VII, the appellee called Irene Nelson as a witness, who testified that appellant came to her shop to purchase a camera, and in the course

of the conversation, appellant told her his work was F.B.I. Secret Service. Appellant asked her to hold the camera until his money came from Washington, D. C. She further testified that he came in later and said his check had not come, but would pay later, and she held the camera (Tr. 110).

Over the objection of appellant, the Court allowed Miss Nelson to testify that she believed he was an F.B.I. man or she would not have held the camera for two weeks (Tr. 110). Appellant admitted that he purchased the camera and paid for it in several payments, but denied he ever represented himself to be an F.B.I. The jury acquitted him on this count.

This statement of the case has been longer than was anticipated, but we feel that a full statement of the facts will well demonstrate the prejudice that must have arisen in the minds of the jury by reason of the errors committed by the District Court.

ASSIGNMENT OF ERRORS TO BE RELIED UPON

The appellant will rely upon the following assigned errors:

- No. 1—Transcript 179.
- No. 2—Transcript 181.
- No. 3—Transcript 182.
- No. 4—Transcript 183.
- No. 5—Transcript 184.
- No. 6—Transcript 185.
- No. 9—Transcript 189.

ARGUMENT**Assignment of Error No. 1:**

The Court erred in admitting in evidence over the objection of the defendant (appellant), and erred in refusing to grant the motion to strike the testimony of the witness Stuart on the grounds that the same was incompetent and opinion evidence and not within the issues of the indictment in Count 5.

Assignment of Error No. 1 (Tr. 179) is based upon the contention that the Court erroneously permitted the witness Stuart to give his opinion of what he believed the appellant to be.

The testimony in reference to assignment of error is found on pages 62-63 of the transcript.

The facts demonstrate that appellant, while trying to secure a tire and tube, stated he was a law enforcement officer; that he had secured the children from the mother in Portland, who had taken them from Olympia, Washington, and that he showed his credentials and badge, which bore the inscription "Haid's Bureau of Investigation"; but that Stuart only saw "Bureau of Investigation." There was no testimony whatever that appellant represented himself to be a United States Marshal. He was specifically charged in Count V of having falsely represented himself to be a United States Marshal. Nothing from the facts testified to suggested he was pretending to be a United States Marshal until the Court erroneously allowed him (Stuart) to testify he (Stuart) believed him to be a United States Marshal.

Assignment of Error No. 2 reads as follows:

That the District Court erred in admitting in evidence over the objection of the defendant, that the same was incompetent and opinion evidence the testimony of the witness Ralph Mathwig:

Assignment of Error No. 2 is found at page 181 of the Transcript and the testimony in reference thereto is found on pages 68 to 76 inclusive of the Transcript.

Here again the Court, over objection, permitted the witness to testify in answer to the inquiry "What did you believe Mr. Haid to be" that he (the witness) believed him to be working for the Government as a government employee, and represented the F.B.I.

Assignment of Error No. 3 reads as follows:

The District Court erred in admitting in evidence over the objection of the defendant and erred in denying the motion to strike testimony of the witness Elizabeth Mathwig:

Assignment of Error No. 3 is found at page 182 of the Transcript and the testimony in reference thereto is found on pages 76 to 84 of the Transcript.

Here again the witness, Elizabeth Mathwig, was allowed to testify as to her opinion as to whom she believed the appellant to be, when she stated: "Well, he gave us to understand that he was a Government man."

Assignment of Error No. 4 reads as follows:

The District Court erred in admitting in evidence over the objection of the defendant, the same as incompetent and calling for a conclusion the testimony of Elizabeth Mathwig.

Assignment of Error No. 4 is found on page 183 of the Transcript and the testimony in reference thereto is found on pages 76 to 84 of the Transcript.

Here again the Court permitted the witness, Elizabeth Mathwig, to state her opinion when she testified, "I believed that he was a Government man."

Assignment of Error No. 5 reads as follows:

The District Court erred in admitting in evidence over the objection of the defendant, the same was incompetent and calling for conclusion of the testimony of the witness Clara Gross:

Assignment of Error No. 5 is found on page 184 of the Transcript and the testimony in reference thereto is found on pages 118 to 120 inclusive of the Transcript.

The evidence of Mrs. Gross was cumulative. No charge was laid in the indictment that Appellant had misrepresented himself to her, but she was permitted to testify in answer to the question: "I want to show you Plaintiff's Exhibit 2, and ask you if that is the badge or similar badge to the one he showed you at that time?" Answer: "Well, I couldn't say, but it looks like it. I saw Bureau of Investigation, and I thought it was Federal Bureau of Investigation. It looked like it to me, it had on it Federal Bureau of Investigation."

Because Assignments of Error 1, 2, 3, 4, and 5 involve the same principle of law, we shall discuss them together.

As has been noted, all of the testimony which was, in our opinion, erroneously admitted, was to the effect that in the opinion of the various witnesses the appellant was a Government employee, a member of the F.B.I., or a United States Marshal. It was for the jury to determine on the facts what representations or misrepresentations were made, and it was only the jury's providence to decide from the facts whether or not the appellant had misrepresented himself to be what he was not; namely, a Government employee, a member of the F.B.I., or a United States Marshal. The constant reference to the opinions of the various witnesses where supported by the facts or not, was prejudicial error.

In the case of the witness Stuart (Count V), no mention of a United States Marshal was made until the question was put and he answered by giving his opinion. He saw only "Bureau of Investigation" on the badge. If any conclusion of misrepresentation could have been arrived at, it would be that Haid misrepresented himself to be a representative of the Federal Bureau of Investigation.

But he was not charged with that misrepresentation. He was charged with misrepresenting himself to be a United States Marshal, and so he, the witness, supplies, by his own opinion, the missing link—that he believed Haid to be a United States Marshal.

So in the matter of Mrs. Elizabeth Mathwig. She testified (Tr. 82) that Mr. Haid never told her directly he was a Government employee, an F.B.I., or a Marshal; that she knew he was a private investigator or special investigator (Tr. 82); that she formed an opinion that Appellant was a Government man (Tr. 82), and the Court allowed her to express that opinion. That question was one for the jury to determine; certainly not the witness.

He was charged in Count III (Tr. 4) with misrepresenting himself to be a Special Agent of the Federal Bureau of Investigation.

Ralph Mathwig clearly was expressing his own opinion when he stated (Tr. 73): "I took him to represent the F.B.I." Nowhere are the words "F.B.I." used, except as his own opinion.

"It is a fundamental principle of the law of evidence as demonstrated by our Courts, both in civil and criminal cases, that the testimony of witnesses upon matters within the scope of the common knowledge and experience of mankind, given upon the trial of a cause, must be confined to statements of concrete facts within their own observation, knowledge and recollection; that is, facts perceived by the use of their own senses, as distinguished from their opinions, inferences, impressions, and conclusions drawn from such facts. Generally speaking, the opinion or conclusions of a witness upon a fact or facts in issue is incompetent and inadmissible, although there are some exceptions to this rule as well settled as is the rule itself, where the issues involve facts and matters calling for special skills and study, or where the facts in controversy are incapable of being detailed and

described so as to give the jury an intelligible understanding concerning them.”

20 *Am. Jur.*, Page 634, Section 765.

“It is a familiar rule without exception, that the opinion of a witness not founded on science or in relation to any special business, art or trade, requiring peculiar knowledge, but given purely as the witness’ theory concerning an issue of morals or duty is inadmissible, whether such opinion be by a professional or non-professional witness.”

Rogers Expert Testimony, Page 32, Sec. 11.

The issue for the jury to determine in this case was: Did the appellant misrepresent himself to be the particular officer or employee charged in the various counts of the indictment?

What he said or did could be accurately detailed to the jury. They were not incapable of being detailed and described to the jury.

“A witness should state facts, and the conclusions to be drawn from them rests with the jury.”

Ventress vs. Smith, 35 U. S. 161, 9 L. Ed. 382.

The general rule is well stated in 11 R.C.L. 565:

“It is for the jury to determine the truth as to the evidential facts from the testimony of the witnesses, and to draw the conclusion deducible from such evidential facts by the exercise of their own judgment and reasoning powers. As to conclusions upon matters within the scope of common knowledge and experience, the jury is a tribunal well fitted to perform this task. To

permit a witness to state to the jury his opinions as to the conclusions to be drawn from the concrete facts which he has observed would be to invade the peculiar province of the jury; and therefore conclusions of that character are universally excluded. Thus, a question is improper if it requires the witness to judge of the probative effect of a fact, as, for example, whether he knows of anything pointing to the guilt of anyone other than the accused, or whether he has discovered any evidence connecting the accused with the crime, or whether he said anything which led another person to believe he was going to execute a certain instrument, or whether he ever admitted to anyone that certain land did not belong to him. Nor may the witness be allowed to give his conclusion as to matters exposed to the view of the jury and as to which the jury is fully capable of forming their own opinion; as, whether a photograph in evidence resembles the witness. Still more repugnant to our law of evidence is the witness's mere unsupported supposition or belief as to some fact in controversy, his opinion on a question of law or on that which involves a question of law, or the opinion expressed by, or shown by the actions of, some person not a witness." 11 R.C.L. 565-567.

The rule is particularly well discussed in reference to agency in 90 A.L.R. 749-758, and a number of cases are cited therein.

"The general rule that facts and not conclusions should be stated is a wise and salutary one, and cannot be too strictly followed. It tends to prevent fraud and perjury, and is one of the strongest safeguards of personal liberty and private rights. Whenever it is doubtful whether the case falls under the rule or under one of its exceptions, the wise course is to place it under the rule."

Fred J. Keisel & Company vs. Sun Insurance

Office of London, 88 Fed. Rep. 243-249 (C.C.A. 8);

St. Louis-San Francisco Railway Co. vs. Barton, 18 Fed. (2d) 96.

“Where an issue, its subject matter, and facts which condition its decision are single and open to the common understanding, so that no special skill is required to form a correct judgment upon it, the opinions of witnesses regarding it are inadmissible.”

Lake vs. Shenango Furnace Co., 160 Fed. 87;

Manufacturers Accident Indemnity Co. vs. Dorgan, 58 Fed. 945 (C.C.A. 8).

Testimony as to whether a particular person was agent held properly excluded as conclusion.

Fuller Process Co. vs. Texas Company, 16 Fed. (2d) 108 (C.C.A. 8).

In the case of *United States vs. O'Connell*, 43 Fed. (2d) 1005, the Court excluded the testimony of a Customs Officer that person was known to him as a bootlegger. The Court held that such testimony could not be received in any Court as a statement of fact on which a judicial declaration might be made.

The writer of this brief has searched diligently to find a case with facts similar to the facts in this case, but he has not been able to discover such a case. However, the law applicable to the facts is well demonstrated in the citations above set forth. No other conclusion can be reached here but that the Court erred in allowing the witnesses to testify as to their opinion of the official capacity that the Appellant here represented himself to be. Such error was pre-

judicial, and did not happen in one instance, but in at least five or six instances, and particularly in the matter of the testimony of Clara Gross. No charge whatever was laid in the indictment concerning any representations to Mrs. Gross, and the accumulation of all these witnesses testifying to their opinion and their belief as to what office or what officer Mr. Haid was certainly could not help but prejudice the minds of the jurors.

Assignment of Error No. 6 reads as follows:

The District Court erred in admitting in evidence, over the objection of the defendant that the same was incompetent and hearsay, the testimony of Walter Camfield.

This assignment of error is set forth in full in the Transcript, Pages 185-186, and the testimony in reference thereto is found at Page 147-148 of the Transcript.

Walter Camfield was called as a witness for the defendant and testified that when Haid called him on the 'phone, he, Haid (the appellant herein), introduced himself as "Haid of Haid's Detective Bureau"; (Tr. 146) that Camfield was the father of Wildabelle Sorrell and the son of Laura May and Clarence Camfield; that he had sent the appellant to his mother, Laura May Camfield, concerning paying the reward (Tr. 146), and that the appellant had made several reports to him about the progress of the investigation. On cross-examination, over objection of the appellant, the Court permitted Walter Camfield to testify that his mother, Laura Camfield, out of the pres-

ence of the appellant, referred to Mr. Haid as “a detective of the F.B.I.” (Tr. 147-148).

This was the rankest kind of hearsay. The appellant was not present during the conversations between Walter Camfield and his mother, Laura May Camfield, and yet the Court permitted Walter Camfield to testify as to what reference she (Mrs. Laura Camfield) made concerning appellant, to-wit: “that he was a detective of the F.B.I.”

The law on this question is well settled:

“The general rule is that hearsay evidence is inadmissible.”

20 *Am. Jur.*, Page 403, Sec. 454.

There are certain exceptions such as dying declarations, statements against interest, original records lost or destroyed, confessions *Res Gestae*, expert opinion evidence and evidence to prove the age or race of an individual and boundaries, but the evidence admitted in this case is not within any of the exceptions of the rule.

Justice Marshall clearly set forth the reason for the hearsay rule in the case of *Mima Queen vs. Hepburn*, 7 Cranch 295; 3 L. Ed. 348, in which he states at page 350 of 3 L. Ed., as follows:

“It was very justly observed by a great judge that ‘all questions upon the rules of evidence are of vast importance to all orders and decrees of men; our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.’

“One of these rules is, that ‘hearsay’ evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

“To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact.

“It will be necessary only to examine the principles on which these exceptions are founded to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye witnesses to that fact are dead. But if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule: the value of which is felt and acknowledged by all.

“If the circumstances that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained.”

The law is so well settled and the error so pro-

nounced, it seems unnecessary to cite all of the cases on this subject, so we will content ourselves with citing only some of the outstanding cases:

Elliott vs. Pearl, 10 Pet. 412, 436; 9 L. Ed. 475;

James Donnelly vs. United States, 228 U. S. 243, 708; 57 L. Ed. 820, 1035; 33 S. Ct. 449, 1024; Ann. Case 1913 E 710;

Lucas vs. United States, 163 U. S. 612; 41 L. Ed. 282, 16 S. Ct. 1118;

United States vs. LaFavor, 96 Fed. (2) 425 (C.C.A. Wash.);

Harris vs. United States, 70 Fed. (2) 889 (C.C.A. 4th);

Harrison vs. United States, 200 Fed. 662 (C.C.A. 6);

Hart vs. United States, 240 Fed. 911 (C.C.A. 2);

Nicols vs. United States, 72 Fed. (2) 780 (C.C.A. 3).

It might be argued by the appellee herein that the evidence of Walter Camfield above referred to was error, but not prejudicial error. The whole question in this case is, "What did the appellant represent himself to be?" That was a question solely for the jury to answer from facts, not opinions or hearsay evidence, and the statement of Laura Camfield made to her son was prejudicial.

As was said by the Supreme Court of the State of Washington in the case of *State of Washington vs. Rudolph Chester Robinson*, 124 Wash. Dec. 868, at page 874:

“It is highly improper for courts, trial or appellate, to speculate upon what evidence appealed to a jury. Jurors and courts are made up of human beings, whose condition of mind cannot be ascertained by other human beings. Therefore, it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors. The state attempts to safeguard the life and liberty of its citizens by securing to them certain legal rights. These rights should be impartially preserved. They cannot be impartially preserved if the appellate courts make of themselves a second jury and then pass upon the facts. One of the first propositions of the orderly administration of the law is that a defendant, either guilty or innocent, shall be accorded a fair trial. The fact that this or the trial court may consider the accused to be guilty in no wise lessens the court’s duty to see that he has a fair trial. A fair trial implies among other things that the court exclude all evidence that has no material bearing on the case.”

This case was decided April 8, 1946.

The District Court erred in refusing to grant the Defendant’s (Appellant’s) motion for a new trial.

Assignment of error No. 9 reads as follows:

“That the District Court erred in refusing to grant the Defendant’s motion for new trial” (Tr. 189).

We submit that the errors complained of in our various Assignments of Error were all important, and that the admission of evidence as hereinabove discussed was prejudicial to the Defendant (Appellant), and deprived him of a fair trial, and the District Court should have granted the motion for a new trial.

CONCLUSION

As has hereinbefore been stated, at least five or six witnesses were allowed to testify as to what they believed, or what their opinion was, and what their conclusions were as to what particular office or employment Mr. Haid held with the Federal Government.

The question that the jury had to determine was whether or not there had been any misrepresentation, and the statement by the witnesses of their conclusions and opinions was in fact a substitution of the judgment of the jury. The witnesses had stated the facts, their observations, and the representations that were made by the Appellant. It was for the jury to determine the truth, and to draw the conclusions deducible from such evidential facts by the exercise of their own judgment and reason.

We therefore submit that the Court was in error in admitting the opinions of the witnesses and the hearsay testimony of Walter Camfield, and that the judgment should, therefore, be reversed, and a new trial granted.

Respectfully submitted,

BERTIL E. JOHNSON,

Attorney for Appellant.

APPENDIX

ASSIGNMENTS OF ERROR

(See Index for Pages)

1. The District Court erred in admitting in evidence, over the objection of the defendant, and erred in refusing to grant the motion to strike the testimony of the witness Stuart on the grounds that the same was incompetent and opinion evidence and not within the issues of the indictment on Count 5.

“Q. (by Mr. Sager): Did he say anything to you about being a Government man?”

“A. Well, I am not going to state that he said he was a Government man right out, but he made indications to believe—I thought he was a Government man from his identifications from the Bureau of Investigation. That was the first anything has been said about the Government.

“MR. JOHNSON: If the Court please, I move that be stricken and I object to the question, for the reason that we are charged in the Indictment with having represented to be a United States Marshal, and obviously, in view of the answer now of the witness, that is not in conformity with the charge with which we have been charged.

“MR. SAGER: We will get to that.

“MR. JOHNSON: I think we are entitled to have strict proof on it.

“THE COURT: Your motion will be denied at this time.

“MR. JOHNSON: Exception.

“Q. Did you believe he was a Government man?

“A. I did.

“MR. KIBBE: Now, I move that be stricken, what he believed. What Mr. Haid had told him is the only thing that would justify that, what he believed. He might believe I was President of the United States and I would not be.

“THE COURT: I think the rule would be different, Mr. Kibbe, in this particular charge on this count—where this is one of the counts. I shall have to overrule your objection and allow you an exception.

“Q. What was your belief as to what capacity and what he was acting as, as a Government man?

“A. Well, my belief, if I seen a star, would mean a man was a law enforcement officer, and naturally bound to be a marshal or police of some kind. I think anybody with any common reason would think the same thing.

“Q. What was your actual thought about it, what did you think he was?

“A. I thought he was a marshal.

“MR. JOHNSON: May my objection go to all this testimony?

“THE COURT: Yes.

“A. (Continuing): From the reading on his badge, and that is all I paid any attention to, that part of the badge convinced me in selling the tire in truth he was a Government man.

“Q. What did you say?

“A. I figured he was a marshal, naturally.”

2. The District Court erred in admitting in evidence over the objection of the defendant, that the same was incompetent and opinion evidence the testimony of the witness Ralph Mathwig:

“Q. (by Mr. Sager): Mr. Mathwig, what did you believe of Mr. Haid’s capacity—or—

“MR. JOHNSON: If the Court please, object to that, on the ground that it is incompetent and not the proper basis on which—that the testimony is purely a matter of opinion, and the ultimate question to determine is what the facts were, and that matter is for the jury to determine.

“THE COURT: Yes, the jury will finally have to determine the question of whether or not this person parted with any property or anything on the belief and on the representation of—what he believes of course is not conclusive of what the factual matter is or was. However, he may answer the question and exception allowed.

MR. JOHNSON: Exception.

“Q. The question is, Mr. Mathwig, what did you believe Mr. Haid to be?

“A. Well, after Mr. Haid asked me whether my sister had told me about whether he worked for the Government or not, and he showed me the badge, why I took him for a Government employee.

“Q. You took him for what?

“A. I took him for a Government employee.

“Q. Did you take him for any particular Government employee?

"A. By the badge, I took him he represented the F.B.I.

"Q. The words 'Department of Justice' suggested that to you?

"A. Yes sir.

"Q. Would you have let him take these drugs if you had not thought he was a Government man?

"A. No, I would not, because I figured we would be responsible."

3. The District Court erred in admitting in evidence over the objection of the defendant and erred in denying the motion to strike testimony of the witness Elizabeth Mathwig:

"Q. (by Mr. Sager): Did Mr. Haid tell you why he was examining the drugs?

"A. Well, he gave us to understand that he was a Government man.

"MR. JOHNSON: I move that be stricken.

"Q. Well, what did he say?

MR. JOHNSON: Just a moment.

"A. That is so long ago—

"MR. JOHNSON: Just a minute, Mrs. Mathwig.

"THE COURT.: I will overrule your objection, Mr. Johnson.

"A. I couldn't tell you the exact words.

"MR. JOHNSON: Exception."

4. The District Court erred in admitting in evidence over the objection of the defendant, the same as incompetent and calling for a conclusion the testimony of Elizabeth Mathwig.

“Q. (by Mr. Sager): What did you believe as to Mr. Haid’s occupation or employment?

“MR. JOHNSON: Just a minute.

“A. Well—

“MR. SAGER: Just a moment.

“MR. JOHNSON: There is no testimony here whatsoever that Mr. Haid made any representation to Mrs. Mathwig concerning his being connected with the Government in any degree, and certainly now she may have formed an impression of what somebody else may have told her. That no, is not competent evidence and is objected to on that ground.

“THE COURT: Of course, she will understand—the witness understand what she believed or what she thought at that time, and not what she thinks now. The question is limited to that extent. The objection will be overruled and exception allowed.

“Q. At the time, Mrs. Mathwig—at the time Mr. Haid was coming out to your place, what did you believe was his occupation?

“A. That he was a Government man.

“Q. Would you have permitted him to take the drugs if you had not believed him to be a Government man?

“MR. JOHNSON: Object to that.

“A. No, I wouldn’t.

"THE COURT: Whenever there is an objection, you wait.

"MR. JOHNSON: Object to this on the basis there is no testimony now in evidence, so far as Mrs. Mathwig is concerned, of any impression she received from Mr. Haid himself or any misrepresentations on his part as to the fact that he was not—that he was employed by the Government in any confidential capacity.

"THE COURT: Objection will be overruled, Mr. Johnson. Exception allowed.

"Q. Would you have entered into this arrangement with him for the attempt to reconvert the hospital if you had not thought he was a Government man?

"MR. JOHNSON: Object to that, if the Court please, on the same ground.

"THE COURT: Same ruling.

"A. No, you wouldn't do this to a perfect stranger.

"Q. Would you have loaned him the \$170 on the note?

"A. No, I wouldn't, neither.

"MR. JOHNSON: Same objection.

"THE COURT: Same ruling."

5. The District Court erred in admitting in evidence over the objection of the defendant, the same was incompetent and calling for conclusion, the testimony of the witness Clara Gross:

"Q. (by Mr. Sager): I want to show you

Plaintiff's Exhibit 2 and ask you if that is the badge or similar badge to the one he showed you at that time?

"A. Well, I couldn't say, but it looks like it. I saw Bureau of Investigation, and I thought it was Federal Bureau of Investigation. It looked like it to me, it had on it Federal Bureau of Investigation.

"MR. JOHNSON: Object as calling for a conclusion.

"THE COURT: Objection will be overruled.

"MR. JOHNSON: Exception."

6. The District Court erred in admitting in evidence over the objection of the defendant that the same was incompetent and hearsay, the testimony of the witness Walter Camfield.

"Q. (by Mr. Sager): Now, did you ever talk to your mother about this matter of Mr. Haid?

"A. Naturally I would.

"Q. How did she refer to Mr. Haid?

"A. How did she refer to him?

"MR. JOHNSON: I object to that as being purely hearsay.

"THE COURT: Objection will be overruled.

"MR. JOHNSON: How this mother referred to him out of the presence of the defendant?

"THE COURT: Objection will be overruled, Mr. Johnson, exception allowed.

"THE WITNESS: Shall I answer that question?

"THE COURT: Yes.

"A. Okeh, she would always refer to him as
a detective of the F.B.I.

* * * * *

"Q. I mean, Mr. Haid was not present when
your mother made that statement.

"A. No."

9. The District Court erred in refusing to grant
the defendant's motion for a new trial.

No. 10978

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

MURRELL F. HAID,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

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Attorneys for the Appellee.

FILED

OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON

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HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellant was convicted on three counts out of seven contained in an Indictment, each of them charging him with separate offenses against Section 76 of Title 18, United States Code. This Statute prohibits one from falsely assuming or pretending to be an officer or employee of the government, and thereby obtaining anything of value. The alleged offenses all occurred during the period from April 1, 1943 to July 31, 1944, while the defendant was operating a detective agency at Olympia, Washington.

The alleged charges grew out of his efforts to enhance his private detective business by falsely representing himself as having various offices, employments and connections with the government.

Commencing at page 5 of the appellant's brief, he sets forth a recital of what is termed the government's evidence in support of its charges, but because of the sketchy character of the appellant's resume of the evidence, we think it advisable to set out the additional evidence offered by the government in order that the full scope and extent of his misrepresentations and impersonations do not escape this court.

The additional evidence concerning Count I, which had to do with the appellant's transactions with Ruth McConkey are these: He told her he had been sent up here from Los Angeles by the government to oversee the program, contracts and things at Fort Lewis as a sort of undercover man (Tr. 36, 37, 38); that he was required to wear Army clothes by virtue of government regulations (Tr. 37); that his private detective work was merely to cover up his real reason for being here; that he could not discuss his government work as it was confidential in war time (Tr. 38). He not only carried a gun, but showed it to her on more than one occasion, and on one occasion he

said he had had the gun barrel cut down at Fort Lewis because of government regulations (Tr. 39); he told her he could put a man behind the telephone and listen to telephone conversations (Tr. 39).

On their trip to Portland after the children, when he had a blow-out, his first effort to stop a passing car was unsuccessful. So, he then pulled out his badge, saying: "That ought to do it", and stopped a car by flashing a badge (Tr. 39, 40). On this same trip he was stopped at Chehalis by the police for speeding. He talked himself out of that with the aid of his badge (Tr. 41); in addition to the \$1225.00, which Mrs. McConkey paid him for services in connection with the children, he borrowed \$100.00 from her upon his representation that his government check was slow (Tr. 42), and later when she tried to collect this \$100.00 he again told her that the government was slow in paying him (Tr. 43); he told her that with his connections he could bring back her brother (Dr. Mathwig), and have him run the hospital (Tr. 44), that he had to account to the government for his hours; when she asked him for the records on the Mathwig children investigation he said, "No one gets those, they belong to the government" (Tr. 44). He told Mrs. McConkey's husband, Carl McConkey, that he had at one time been employed by the government in an investigation

which required his carrying the mail (Tr. 58). He displayed his gun and handcuffs to Mr. McConkey, saying that they were used in his official capacity (Tr. 59).

Count II charged an impersonation to Mrs. Gertrude Highmiller. The evidence in support of this count, in addition to that disclosed in appellant's brief is as follows: At the time Mrs. Highmiller's husband was a doctor in the Medical Corps overseas (Tr. 88); Haid told her that he was fingerprinting the school children upon the order of the government (Tr. 89). He stated to her that through his connections he could get a man behind the board at the telephone company to find out who was making the alleged anonymous calls to her. This, despite the Federal Communications Law (Tr. 90); he told her he had been sent from Texas to California to do special work for the Navy (Tr. 91). He told her he wore Army clothes, of which he had several pair, when doing special work at Fort Lewis (Tr. 92). He told her he could have his gun cut down at Fort Lewis, but because it would take two or three weeks there, he had it done at Olympia (Tr. 93).

On Count III the defendant was convicted. This count charged his impersonation to Mrs. Elizabeth Mathwig and son, Ralph Mathwig. Evidence con-

cerning this charge, in addition to that recited in the appellant's brief, is as follows: Ruth McConkey was the daughter of Mrs. Elizabeth Mathwig, and a sister of Ralph Mathwig, and it was through the defendant's employment by Mrs. McConkey that he came to know the Mathwigs. Mrs. Mathwig was an aged lady whose husband had died a long time ago, and she had some difficulty expressing herself in the English language (Tr. 76, 77).

On one occasion, when the defendant and his wife were at the Mathwig's residence, Haid beckoned Ralph Mathwig to come into a room out of the presence of the two women, and there he said to him, "I presume your sister (Mrs. McConkey) told you that I work for the government", and Mathwig answered "Yes". Haid then pulled out his badge, which the witness said had the words "Issued by the Department of Justice", and showed it to Mathwig. When Mathwig showed little interest in the badge, Haid specifically directed his attention to the wording on the badge. Haid cautioned him to keep mum, not to say anything to anyone (concerning his office with the government presumably). During this same conversation the FBI was mentioned by one or the other (Tr 69, 70).

Two or three times he wore Army pants and shirts and told Ralph Mathwig he had a right to wear them. The Army clothes were exactly like those worn by the witness' brother (Captain Mathwig, an officer in the Medical Corps). He said something about working at the Bremerton Navy Yard (Tr. 71 and 75). When Ralph demurred to having blue prints of the house made, because they would have to be changed, Haid said that the government did not care about that, that they would change it to suit themselves. When Haid told Mathwig about his connections in Washington, and with Senator Wallgren, he stated it with much more emphasis than the appellant discloses in his brief (Tr. 71). Mathwig not only saw him wearing his gun, but Haid handed it to him on one occasion (Tr. 73). He told Mathwig the same story he had told others concerning having the gun barrel cut down because of government regulations. He apparently always wore his handcuffs while in the presence of Mathwig (Tr. 74).

In relating the testimony of Mrs. Mathwig, appellant says on page 9 of his brief that she never saw his gun. This statement is not borne out by the record. She stated that he showed her his gun and put it on the table, and that he frequently handled his gun and handcuffs (Tr. 77 and 84). The appellant's brief states at page 9 that on one occa-

sion Haid gave her some meat points, but it omits the significant part of that testimony, which was her statement to him in connection with his giving her meat points that "You are a government man and giving me points", and he failed to correct her (Tr. 77 and 82). When he was looking over the drugs in Mrs. Mathwig's home he told her he had a right to take them. He also told her he could get the government to finish the hospital and to get her son to come back and run it. That he could accomplish this through his influence in Washington (Tr. 78). The \$170.00 which Haid got from Mrs. Mathwig as a loan had not yet been repaid at the time of the trial. It was then long overdue (Tr. 79; plaintiff's exhibit 18). In addition to this \$170.00 she had paid Haid approximately \$250.00 as expense allegedly incurred in his efforts in behalf of the hospital (Tr. 80 and 83).

The defendant was convicted on Count IV. This count charged him with obtaining \$100.00 from Laura Camfield by representing himself to be an FBI. Mrs. Camfield was a woman 72 years of age (Tr. 112). When Mrs. Camfield gave him the \$100.00 it was in a \$100.00 bill, and she said "Guess that is the largest piece of money you have had for a long time", and he said, "Oh no, I went down to California and brought back some prisoners. I got over

\$2,000.00 for it" (Tr. 114). She asked him, "How does the FBI go about finding anyone like this?" And he answered, "Oh, we have ways to find them." She then asked him how long it would take, and he answered, "It will take a week or two weeks, or six weeks, but we will have her back." As with the others he showed her his gun. And after he gave her the receipt for the \$100.00 (plaintiff's exhibit 32) he told her "We will put the FBI on the tracks right away". She thought he was an FBI and would not have paid him the \$100.00 except for that belief (Tr. 114). When Haid first called on Mrs. Camfield he had a picture of her granddaughter for whom the reward had been offered, which he said he had obtained from the Sheriff. Haid never found the granddaughter (Tr. 115).

Mrs. Camfield's husband, C. H. Camfield, testified that when Haid first called he said his name was Haid, and he was from the Bureau of Investigation. He showed him his badge which was similar to plaintiff's exhibit 3, but in showing it he had his thumb over the top of it. He also showed them his gun that night. He testified that Mrs. Camfield asked Haid how many FBI there were in Olympia, and he answered there were three.

The appellant omits from his brief, in connec-

tion with the Camfield count, the testimony of Clara Gross and her son, William Gross. This was all part of the testimony in support of Count IV and briefly it was as follows:

Mrs. Gross testified she lived across the street from Walter Camfield, the father of the missing girl, and the son of Laura Camfield. Haid first called her on the telephone to inquire about the missing girl. The reward ad in the paper (plaintiff's exhibit 31) referred to Mrs. Gross' telephone number. After making inquiries about the girl in this telephone conversation, Mrs. Gross asked Haid who he was, and he said he was Mr. Haid from the FBI. They then arranged that he was to come out to see her (Tr. 118 and 120). Upon arriving at her home Haid showed her his badge, and she saw the words Bureau of Investigation, and thought it was Federal Bureau of Investigation. She also saw his gun. He took this from his holster, showing it to her and her son (Tr. 119).

The boy, William Gross, testified he was 14 years of age, and he was present the evening when Haid first called upon his mother. Pretty soon, after Haid showed his badge, which the boy did not see distinctly, he pulled out his gun. The boy offered to show him a gun he had similar to it, and invited him into

his room. There Haid said, "I use this gun in my business." The boy asked, "What is your business?" and Haid replied, "I work for the FBI" (Tr. 121).

The defendant was convicted on Count V, which charged him with representing himself to Everett Stuart as being a United States Marshal, and thereby obtaining an automobile tire and tube without surrendering a ration certificate. There was some testimony concerning this transaction by Mrs. McConkey. Stuart testified as follows in addition to that recited in appellant's brief: That Haid told him that he was a law enforcing officer, and was entitled to a tire in an emergency without a ration certificate (Tr. 61). Haid was talking about being a government man, and Stuart said to him, "Well I am going to let you have the tire since I do not believe Uncle Sam would put one of his own men in jail. If he does I will be right behind him, and we will both be in jail" (Tr. 61). From the reading on his badge, Stuart was convinced he was a government man (Tr. 63). Haid showed him his badge and he observed the words "Bureau of Investigation" (Tr. 60, 62, 63, 64). Haid told Stuart that he was on a seizure case. That he had been down to Oregon to get the girls, and was bringing them back to Olympia. Stuart understood that he was no common officer of Washington because he had crossed the interstate line (Tr. 60, 64, and

65). He believed he was helping an officer of the law and in such a case was entitled under the OPA to furnish tires until such time a certificate could be obtained. He was convinced that Haid was a law enforcement officer (Tr. 65). There was talk about Haid being a government man, which he did not deny and he would not have gotten the tire had Stuart not believed him to be a government man (Tr. 65, 66).

The additional evidence in support of Count VI is as follows: Mrs. Lillibridge's husband was a medical officer in the Army, and because of this enforced separation she was renting certain quarters at her home primarily to Army personnel and their wives so that they could be together (Tr. 104 and 108). He told her he had been sent up from California by the government to this defense area; that he had to have a telephone in his business, that he was doing work for the government, that he had been on special assignments in the South, and was much interested in finger printing. He mentioned his assignments for the government whenever there was an opportunity. He was taking finger prints of the school children in Olympia, and told Mrs. Lillibridge that they were sent to the Department of Justice. He said he was very busy with the government assignments, and so she should not use the telephone (Tr. 105 and 107).

His gun was always in evidence. He told Mrs. Lillibridge not to go near the house because it was wired, that if it burned down to let it burn, and that he kept the house locked and wired because there were very confidential matters in it, and he did not want anybody getting in (Tr. 105, 106).

Mrs. Lillibridge told Haid he would have to have a Coast Guard identification in order to use a boat which had been washed upon the beach. He answered that would not be necessary because his credentials and means of identification were so much better than the Coast Guard (Tr. 106).

Mrs. Lillibridge's daughter, Jean, age 19, testified that Haid told her on one occasion concerning some envelopes and papers on his desk, that they were some work he was doing for the government, and he was very busy (Tr. 108).

Additional evidence not recited by appellant concerning Count VII is as follows: When Haid told Mrs. Nelson his work was FBI-Secret Service, he also stated that the camera he was attempting to purchase was the kind he used in his work, and that it was essential to his work (Tr. 109 and 110). He told her a number of times he intended to use it for FBI work, and on one occasion she said, "That is a little strange, I did not know we had an FBI man here in Olympia",

and he answered, "Uh huh". He told her he was an FBI man, and she believed him and would not have held the camera for him except for that belief (Tr. 110, 111).

Other evidence produced by the government in support of the charges generally is as follows:

J. E. Stearns, a Deputy Sheriff for Thurston County, at Olympia, testified he had known Haid a year and one-half, or two years. He told Stearns he had worked for the government in Texas, that he had had a rigid course of training and instruction in that work. He told Stearns the government felt he was doing better work for the war effort in Olympia than he had been in Texas (Tr. 122).

Ellsworth Wood was a police officer for the city of Olympia. As a son-in-law of Mrs. McConkey he knew Haid well, having worked for him for a short period of time in the fall of 1943. He told Wood that he had worked for the Secret Service at a Navy defense plant in Los Angeles (Tr. 123). On several occasions he told the witness that he had worked for the Army Intelligence during the first World War and was now stationed in this district to work for the Army Intelligence. He was quite secretive about it. He told the witness he was working for the In-

telligence Unit of the United States Army (Tr. 123 and 128).

Wood testified that Haid generally dressed in Army officers' pinks. They were regular pinks, the same as were worn by regular commissioned officers (Tr. 123 and 125). He carried a gun and handcuffs (Tr. 124).

Orville R. Wilson testified: That he was an Agent of the Federal Bureau of Investigation, and had investigated the case against Mr. Haid. Mr. Wilson called on Haid on three occasions, August 21, August 24, and September 28, 1944. Haid showed him his credentials upon which he had his picture. In the picture he wore an officer's type cap, and an officer's type shirt. He explained to Wilson that the picture was one of him in his guard uniform taken while he was employed at a defense plant in California (Tr. 95, 96). Between Wilson's first visit and a subsequent visit to Haid, Haid changed his credential cards from "Haid's Bureau of Investigation" to "Haid's Detective Bureau" (Tr. 95; plaintiff's exhibits 4 and 22). He carried a gun and handcuffs and produced them from his person (Tr. 96). Wilson asked him if he ever used his credentials by placing his thumb over the word "Haid's", and saying "I am Haid of the Bureau of Investigation", and

Haid answered he had not done that. Asked what would be the implication if he had, Haid answered "That would have meant that he was Haid of the Federal Bureau of Investigation" (Tr. 96). He told Wilson on the occasion of his first visit to him that he was having his credentials changed to "Haid's Detective Bureau" because "Haid Bureau of Investigation" might be misconstrued to mean the Federal Bureau of Investigation, and that during war time he did not want any question of misrepresentation to arise (Tr. 97).

During the first and last visit of Wilson to Mr. Haid, Haid had his badge changed from "Haid's Bureau of Investigation" to "Haid's Detective Bureau" (Tr. 97). On Wilson's last visit he showed Haid his official FBI badge. Haid showed considerable interest in it, stating that it was not as impressive as the badges worn by FBI agents some years ago. He then described such earlier badge to Mr. Wilson, and the description he gave of the former FBI badges is strikingly similar to the badges which Haid himself was carrying (Tr. 97; plaintiff's exhibits 2 and 3). He admitted to Wilson that he had flagged down a passing motorist near Chehalis, Washington, on his trip to Portland, as had been testified by Mrs. McConkey, and told Wilson he intended to represent a law enforcement officer at that time, but

not a Federal Law enforcement officer. He would not state what type of law enforcement officer he was intending to represent (Tr. 98).

QUESTIONS INVOLVED

The issues on this appeal, as we interpret the appellant's brief and assignments of error, present two questions, they are:

(1) *Should the victims of the alleged impersonations have been allowed to testify they believed the defendant to be a government officer?*

(2) *Was prejudicial error committed in permitting the defendant's witness, Walter Camfield, to testify on cross examination that his mother, Laura Camfield, the alleged victim in Count IV, referred to the defendant as a detective of the FBI?*

Appellant's assignments of error, Nos. 1 to 5 inclusive are covered by the first question. Assignment of error No. 6 is the basis for the second question. Assignment of error No. 9 is apparently based upon the alleged error presented by the other assignments argued. We shall discuss the questions in the order stated as that is the order in which the issues are discussed in appellant's brief.

ARGUMENT

(1) *The Victims' Testimony That They Believed in the Defendant's Misrepresentations Was Properly Admitted.*

The burden of appellant's argument in answer to the first question is that the evidence of the several witnesses was opinion evidence, that it did not come within any of the rules permitting opinion evidence, and hence was inadmissible. We believe, and suggest, that appellant has misconceived the true nature of this evidence. It was not opinion evidence, but was direct evidence of a fact, the fact being the belief or state of mind of the witness testifying. A state of mind, or a belief, if relevant to the issues, is a fact subject to proof by direct testimony. A state of mind is no different than a state of digestion.

It should be noted that in each instance in which the court permitted a witness to testify that the witness believed Haid to be an officer of the government, that such witness was one of the alleged victims of his impersonation. These witnesses were, Elizabeth Mathwig and Ralph Mathwig, named as the victims in Count III (Assignments of Error Nos. 2, 3, and 4), and Everett Stuart, the alleged victim in Count V (Assignment of Error No. 1).

The appellant attempts to bring within the same issue his Assignment of Error No. 5, which is based upon the testimony of the witness, Clara Gross. This witness was not a victim designated in any of the counts of the Indictment. However, it is submitted that her testimony, to which appellant objects, is not in the same category as that of the other witnesses, and that she was not permitted to testify as to her belief or state of mind. The question and answer of Clara Gross, to which the appellant objects, is as follows:

“Q. I want to show you Plaintiff’s Exhibit 2 and ask you if that is the badge or similar badge to the one he showed you at that time?

A. Well, I couldn’t say, but it looks like it. I saw Bureau of Investigation, and I thought it was Federal Bureau of Investigation. It looked like it to me, it had on it Federal Bureau of Investigation” (Tr. 119).

The witness was there stating her recollection of the badge displayed to her by Haid.

A witness may testify directly as to his belief or state of mind when such belief or state of mind is material. The rule is stated in 20 Am. Jur. under the topic “Evidence” at page 312, Section 335, as follows:

“The state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact when it is relevant to an issue in

a case, and the person himself may testify directly thereto. Direct evidence of one's state of mind or of the belief which induced an act is not, however, necessary. A condition or state of mind may be shown by the accompanying circumstances as well as by the direct testimony of the party himself."

And again at page 314, Section 338, as follows:

"It is now well settled that whenever the motive, belief, or intention of any person is a material fact to be proved under the issues of the case, it is competent to prove it by the direct testimony of such person, regardless of whether or not he is a party to the suit. * * * Thus, in suits involving fraud, which depend frequently upon equivocal acts, the direct testimony of the party as to his intention is generally admissible."

This same rule is affirmed in *Chicago N. W. Ry. Co. v. McKenna*, 74 Fed. (2d) 155, (C.C.A. 8). The suit was for damages for an assault. The court states at page 157:

"Appellants offered to show by Barrett 'that he was in fear of his life and safety as a result of the assault plaintiff was making upon him with a knife and that is the reason that he shot in defense of his life and safety.' This offer was denied and objections to questions along a similar line were sustained, to which exceptions were preserved. The admissibility of testimony of a party as to his intent or motive depends upon whether intent or motive is a fact permissible to be proved under the substantive law involved in the case."

And again at page 158:

“That a state of one’s mind is a fact question to be proved the same as any other fact was in *Edgington v. Fitzmaurice*, 29 L.R. Ch. Div. 459, stated as follows, ‘But the state of a man’s mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man’s mind at a particular time is, but if it can be ascertained it is as much a fact as anything else,’ cited in *Rogers v. Virginia-Carolina Chemical Co.* (C.C.A.) 149 F. 1. In 10 R.C.L., Sec. 116, page 946, the following appears: ‘The rule is well settled and supported by the weight of modern authority that whenever the motive, belief, or intention of any person is a material fact to be proved under the issue on trial, it is competent to prove it by the direct testimony of such person, whether he is a party to the suit or not.’”

In two cases in this court the same rule has been adhered to, they are:

Deal v. U. S. 11 Fed. (2d) 3 (C.C.A. 9);
Walter v. Rowlands, 28 Fed. (2d) 687
 (C.C.A. 9).

The *Walter v. Rowlands* case was a suit upon a contract. Concerning a witness’ testimony as to his belief, the court says, at page 690:

“It is assigned as error that in answer to the question, what was his understanding of the condition of the C. A. Goodyear Lumber Company at the time of entering into the contract of March 23, 1923, Lamont Rowlands was permitted to testify that his understanding was that the com-

pany was in a very serious condition, and that 'the report of the president to the stockholders indicated that'. It is objected that the testimony was proof, not of the fact of financial difficulties, but only of Rowlands' state of mind. To this it is to be said that the state of mind of the witness had been brought in issue by the plaintiff's contention that he had not acted in good faith in dealing with Henrietta Goodyear. The trial court ruled that the testimony was admissible, not as tending to show the financial condition of the corporation, but as going to the question of the good faith and the understanding of the witness when the contract was made and the source of the information on which he relied. Where the motive of a party in performing an act thus becomes a material issue or reflects light upon the same, he may testify concerning it, and his testimony is competent to be considered for the value which it may have on the question of good faith. Jones on Evidence (2d Ed.) Secs. 709, 710, and cases there cited."

In the *Deal* case, Deal was a Postmaster at Fairbanks, Alaska, and the action was a suit on his performance bond predicated upon a loss of money from a registered package as a result of his negligence. The court states at page 8:

"The court properly denied the motion of defendants to strike out the testimony of Evelyn Houck, the register clerk in the post office that she believed the package contained money. This belief was material in determining the care that the package should receive. The defendant Deal was responsible for Miss Houck's acts and omissions."

According to this rule, the testimony of the several witnesses in this case that they believed Haid to be an officer or employee of the government was competent evidence, if their belief was material to the issues.

The counts upon which the defendant was convicted were all brought under the second clause of the statute (18 U.S.C. 76), which makes as one of the elements of the offense therein proscribed, that the offender "in such pretended character demand or obtain" something of value. This language of the statute implies, if it does not compel, that there must be proof that the alleged victim parted with the thing of value in reliance upon the "pretended character" assumed by the offender. If it is necessary, in establishing the charge, to prove that the victim relied upon the pretense of the defendant, then it is first necessary to show that the victim believed in the pretense and hence, the belief of the victim is a material matter.

That the victim's belief in the pretense of the defendant is a material matter seems to be the holding in the following cases, all impersonation cases under this statute.

In *Littell v. United States*, 169 Fed. 620 (C. C. A. 9) this court says, beginning at page 621:

“The plaintiff in error contends that there was no evidence to go to the jury to show that Mrs. Dabney *relied upon the representations* of the plaintiff in error that he was an officer of the United States in extending credit to him and loaning him money, and that the evidence shows, on the other hand, that the credit was given and money was loaned on other considerations, especially upon consideration of the relations resulting from the answer of the plaintiff in error to the advertisement of Mrs. Dabney and his subsequent engagement of marriage with her. This contention is not sustainable. An examination of the record produces the conviction that the plaintiff in error, before going to Mrs. Dabney’s house, deliberately planned to impersonate an officer of the United States falsely for the purpose of cheating Mrs. Dabney. He took pains to arm himself with indicia of the office which he claimed to hold. He brought to her house packages of papers which he exhibited to her and declared to be government papers. He displayed to her a badge which he represented to be the badge of his office. He often referred to the government property which he said was in his custody, to the burdens of his official duties, and to his anxiety about the Federal Building and the delay in its construction. All of these things were sufficient to impose upon a woman of the education, experience, and intelligence of Mrs. Dabney, and it is no answer to their inculcating effect to say that she omitted to take precautions to verify the statements, and that the falseness thereof might have been readily ascertained. *She testified that she believed them and relied upon them in advancing money and extending credit.* It is argued that in making the \$600 loan to the plaintiff in error Mrs. Dabney relied upon other security than his representations, to-wit, upon the draft which he drew; but what security was

his draft? It was nothing more than his promissory note would have been, and *Mrs. Dabney testified expressly that in lending him the money she relied not upon the draft, but upon the standing of the plaintiff in error as an officer of the United States* (Emphasis ours).

In *Brafford v. United States*, 259 Fed. 511 (C. C. A. 6), the court says at page 512:

"The motion to quash the indictment was properly overruled. The argument pressed here seems to be in substance that the mere impersonation of an officer of the United States government is not an offense under Section 32, and that the indictment is defective in failing to charge that the accused 'took upon himself to act as such inspector' and 'while so acting' obtained the property in question. But it is not necessary to a violation of the second subdivision that the accused 'take upon himself to act as such' United States officer or employe; it is only necessary that the property be obtained by the accused 'in such pretended character.' *United States v. Barnow supra*. We think the allegation that the accused did 'falsely and fraudulently obtain' the money and property 'by inducing' the automobile company to part with it, 'by falsely representing himself to be such officer and employe,' sufficiently charges that the money, etc., was fraudulently obtained 'in such pretended character.' *Littell v. United States* (C.C.A. 9) 169 Fed. 620 622, 95 C.C.A. 148."

And again at page 513:

"The remaining ground of the motion to direct is that there was no substantial proof of the offense charged. We cannot agree with this con-

tention * * * In the case of the Lockwood Company there was express testimony that it refused to sell plaintiff in error gasoline on Sunday, November 3d, when the shop was closed in accordance with instructions from the "Conservation Board of Fuel Directors"; that plaintiff in error thereupon displayed a badge reading "Government Inspector," with the statement that he was called upon to inspect hoof and mouth diseased cattle at a point near Hernando, Miss., and did not have sufficient gasoline to get there and back (there was undisputed evidence of subsequent admissions by plaintiff in error that he was not a government inspector); *that the company's treasurer relying upon this representation and believing that plaintiff in error was a government officer on official business, and wanted the gasoline for use in that business, delivered to him several gallons of gasoline, taking his check dated the next day for the amount.*" (Emphasis ours).

In *United States v. Barnow*, 239 U.S. 74; 60 Law Ed. 155, the Supreme Court used this language, at page 80 of the U. S. Report:

"It is the aim of the section not merely to protect innocent persons from actual loss *through reliance upon false assumptions of Federal authority*, but to maintain the general good reputation and dignity of the service itself. It is inconsistent with this object, as well as with the letter of the statute, to make the question whether *one who has parted with his property upon the strength of a fraudulent representation of Federal employment* has received an adequate *quid pro quo* in value determinative." (Emphasis ours).

There is another reason why the belief of the victim in the pretense of the defendant is material to the issues in a charge under this statute. One of the elements of the offense is that the defendant "intend to defraud either the United States or any person." The "person" here mentioned is obviously the intended victim of the fraud. It probably is not necessary to prove that a fraud was consummated, but it is essential to prove that there was an intent to defraud. The fact that the fraud was actually consummated is at least some evidence of an intent to defraud. The victim's belief in the pretense, in other words, the fact that she was persuaded and convinced by the misrepresentations, is evidence that the fraud was successfully consummated.

(2) *It Was Not Error to Permit the Witness, Walter Camfield, to Testify That His Mother Referred to the Defendant as a Detective of the FBI.*

This issue is presented by appellant's assignment of error No. 6 (Tr. 185). It is predicated upon the testimony of the defendant's witness, Walter Camfield, elicited upon his cross examination. This witness was the son of Laura Camfield, one of the alleged victims in Count IV, and he was the father of Wildabelle Sorrell, the missing girl whom Haid undertook to locate for Laura Camfield. The assign-

ment of error is directed to the following testimony occurring during the cross examination of Walter Camfield: (Tr. 147, 148).

“Q. Now, did you ever talk to your mother about this matter of Mr. Haid?

A. Naturally I would.

Q. How did she refer to Mr. Haid?

* * * * *

Mr. Johnson: I object to that as being purely hearsay.

The Court: Objection will be overruled.

* * * * *

A. Okeh, she would always refer to him as a detective of the FBI.”

This apparent reference to Mr. Haid by the mother was made to the witness out of the presence of the defendant. The appellant contends that it was hearsay.

This evidence was not hearsay. It was not offered to prove the truth of the statement made by the third party to the witness, i.e., it was not offered to prove the truth of the statement that Haid “was a detective of the FBI”. It was offered in proof of the belief or state of mind of the declarant, Laura Camfield, i.e., to prove that she believed Haid was a detective of the FBI. That it was competent evidence for this purpose is clearly shown in 20 Am.

Jur. under the topic of "Hearsay Evidence", at page 404, Section 457, as follows:

"Original Evidence Distinguished. The hearsay rule does not operate, even apart from its exceptions, to render inadmissible every statement repeated by a witness as made by another person. In some instances, the fact that a statement was made, rather than the facts asserted in the statement, is material. The distinction in this respect for the purposes of the hearsay rule is between original evidence and pure hearsay. * * *

There is no question that where a particular state of mind of a person is a relevant fact, declarations which indicate its existence are admissible as primary evidence, notwithstanding the declarant is available as a witness."

And again at page 491, Section 585:

"Assuming that the state of mind of a person at a particular time is relevant, his declarations made at that time are admissible as proof on that issue, notwithstanding they were not made in the presence of the adverse party. It is clear that when evidence of the declarations of a person is introduced solely for the purpose of showing what the state of mind or intention of that person was at the time the declarations were made, the declarations are regarded as acts from which the state of mind or intention may be inferred in the same manner as from the appearance of the person, or his behavior, or his actions generally. The truth of the statements is immaterial when offered to prove a state of mind."

The same rule is announced in *Terry v. United States*, 51 Fed. (2d) 49 (C.C.A. 4). The defendant

was convicted of a violation of the Narcotic Act. One of the assignments of error urged by the appellant is stated by the court at page 51, as follows:

“That the District Court erred in permitting informer Harry VanMiller to testify to conversations which occurred between VanMiller and Ramsey in Jones’ restaurant, because said conversations were not in the presence of appellant, Terry, and were purely hearsay.”

The court answered this contention in the following language commencing at page 52:

“The conversation objected to is as follows: ‘On October 18th, about 2:30 o’clock, I met Frank Ramsey at Dick Jones’ Restaurant and I asked him if he could let me have \$5.00 worth of drugs and Frank Ramsey said: ‘Why don’t you take an ounce — I have just one ounce left’; and I told Frank Ramsey that I did not have enough money at the time’.

In considering this contention, it is pertinent to determine whether or not the conversation between VanMiller and Ramsey on the occasion in question and under the circumstances disclosed by the record is in fact violative of the hearsay rule.

In 3 Wigmore on Evidence, Sec. 1768 (pages 2274, 2275), the author says:

‘The true nature of the Hearsay rule is nowhere better illustrated and emphasized than in those cases which fall *without* the scope of its prohibition. The essence of the Hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their non-testimonial use. The theory of the Hearsay rule

(ante, Sec. 1361) is that, when a human utterance *is offered as evidence of the truth of the fact asserted in it*, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand and subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, *not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted*, the Hearsay rule does not apply. (Italics supplied.)'

'The prohibition of the Hearsay rule, then, *does not apply to all words or utterances merely as such*. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special purpose, namely, as assertions to evidence the truth of the matter asserted.'

* * * * *

That the conversation between VanMiller and Ramsey, objected to, is *without* the inhibition of the Hearsay rule, defined above is apparent. It was not offered as evidence of the truth of any fact asserted in the conversation."

The same rule is recognized by the Supreme Court in *Shepard v. United States*, 290 U.S. 96. In this case the defendant had been convicted of the murder of his wife by poison. The defense was that her death was suicide. During the trial the government offered evidence that the deceased wife had stated to the witness, "Dr. Shepard has poisoned me." This testimony was offered and admitted on the

theory that it was a dying declaration. However, on the appeals it was admitted by the government and held that it was not admissible as a dying declaration because the statement was not made under the conditions requisite to a dying declaration. The government then urged that it was admissible nevertheless, not in proof of the truth of the statement, but to show a will to live on the part of the declarant, and thus to counteract the defense testimony tending to indicate suicide. The court held the statement inadmissible and reversed the conviction on the ground that the statement did not tend to show a will to live, and that its only effect could be to show the fact of the poisoning.

In discussing the applicability of the rule in question Justice Cardozo, speaking for the court, said beginning at page 103 of the U. S. Report:

“The defendant had tried to show by Mrs. Shepard’s declarations to her friends that she had exhibited a weariness of life and a readiness to end it, the testimony giving plausibility to the hypothesis of suicide. Wigmore, Sec. 1726; *Commonwealth v. Trefethen*, 157 Mass. 180; 31 N.E. 961. By the proof of these declarations evincing an unhappy state of mind the defendant opened the door to the offer by the Government of declarations evincing a different state of mind, declarations consistent with the persistence of a will to live. The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the Government put in evidence, however, was something

very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband."

The statement by the witness, Walter Camfield, that his mother referred to Haid "as a detective of the FBI" was therefore admissible to show not the truth of the statement, but her belief or state of mind. It comes within the rule we have been discussing, and was not hearsay, as the appellant contends. As to its materiality the cases cited herein under the first question discussed are authority.

CONCLUSION

All of the testimony admitted to which the appellant objects was properly admitted under well recognized rules of evidence. Its admission was not error.

The record is replete with evidence of a studied course of pretense, misrepresentation and assumption of official authority by the defendant over a period of more than a year. There was no substantial evidence contradicting the government's case, except the testimony of the defendant himself and his wife,

which the jury had every right to disbelieve, and they apparently did.

There being no error the judgment should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney

HARRY SAGER,
Assistant United States Attorney
Attorneys for Appellee.

No. 10982

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. A. SMALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

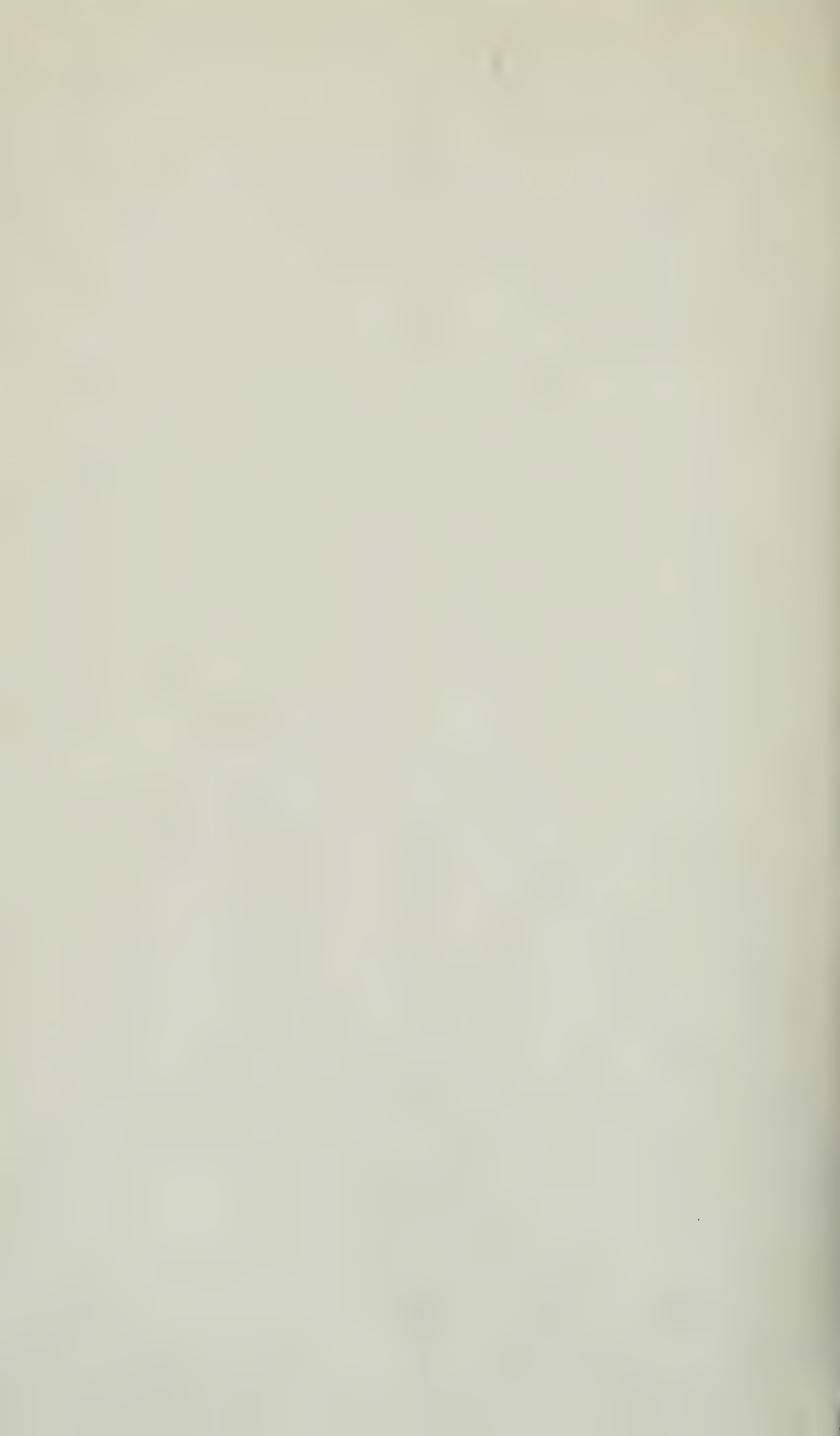
Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

MAY 24 1945

PAUL P. O'BRIEN,
CLERK



No. 10982

United States
Circuit Court of Appeals
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T. A. SMALL,

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Upon Appeal from the District Court of the United States
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NAMES AND ADDRESSES OF ATTORNEYS

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935 Mills Building,
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Mr. FRANK J. HENNESSY,

United States Attorney,
Northern District of California.

Post Office Building,
San Francisco, California.

Attorney for Plaintiff and Appellee.

In the Southern Division of the United States District Court, for the Northern District of California.

No. 28263-S

UNITED STATES OF AMERICA,

Plaintiff,

vs.

T. A. SMALL,

Defendant.

INFORMATION

(Emergency Price Control Act of 1942; Title 50 U.S.C.A., Sections 902(a), 904(a), and 925(b).)

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, and by leave of Court first had and obtained informs this Court: That on or about the 5th day of October, 1943, at Redwood City, County of San Mateo, State of California, within the Southern Division of the Northern District of California, and within the jurisdiction of this Court, *F. A. Small*, (hereinafter called "the said defendant") did wilfully and unlawfully sell to one *F. W. Larkin* certain distilled spirits, to-wit, 100 cases each of which said 100 cases contained twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, at a price of \$46.50 per case, which said price of \$46.50 per case for each of said 100 cases, each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, was in excess of and higher than the maximum price established by law, to-wit, \$27.00 per case for each case

containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, as [1*] the said defendant then and there well knew. (Maximum Price Regulation No. 445, Article VII, Section 7.8; 8 F.R. 11161.)

FRANK J. HENNESSY

United States Attorney

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

Alfred W. Worthington, being first duly sworn, deposes and says: That he is an Investigator employed by the Office of Price Administration; that he has read the foregoing Information; that he is familiar with the facts therein alleged concerning the offense therein described, and that the same are true of his own knowledge.

ALFRED W. WORTHINGTON

Subscribed and sworn to before me this 20th day of December, 1943.

[Seal] E. H. NORMAN

Deputy Clerk, U. S. District Court, Nor. Dist. of California.

[Endorsed]: Filed Dec. 21, 1943. [2]

*Page numbering appearing at foot of page of original certified Transcript of Record.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 11th day of January, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

DEFENDANT'S PLEA OF NOT GUILTY
ENTERED; Etc.

This case came on regularly this day to plead. The defendant T. A. Small was present in proper person and with his attorney Fred. McDonald, Esq. Valentine C. Hammack, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to the Information, which said plea was ordered entered.

After hearing the Attorneys, it is ordered that this case be continued to January 26, 1944 for trial.
(Jury) [3]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 8th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

TRIAL, MOTION FOR A DIRECTED VERDICT DENIED, VERDICT OF GUILTY

This case came on regularly this day for trial. The defendant T. A. Small was present in Court with Fred McDonald, Esq., his attorney. Valentine C. Hammack, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

Thereupon the following persons, viz:

1. Milton J. De Barr
2. F. W. Blanch
3. Joseph Shaddick
4. Marguerite Brooks
5. Mrs. Elizabeth Newman
6. Raymond L. Lilly
7. Mrs. Charlotte Bauer
8. Albert Franzen
9. James L. Culpepper
10. R. D. McCrea

11. Miss Mary Barmby

12. Mrs. Frances Mouille

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Hammack made a statement to the Court and Jury on behalf of the United States.

Mr. McDonald made a statement to the Court and Jury on [4] behalf of the defendant.

Mary Rolandelli, Fred Wm. Larken, George Moncharsh, and Clyde D. Byrd were sworn and testified on behalf of the United States. Mr. Hammack introduced in evidence and filed U. S. Exhibits Nos. 1, 2, 3 and 4. The defendant offered no evidence. Thereupon the evidence was closed. Mr. McDonald made a motion for a directed verdict, which motion was ordered denied. After argument by the attorneys and the instructions of the Court to the Jury, the jury at 2:52 P.M. retired to deliberate upon its verdict. At 3:09 P.M. the jury returned into Court and upon being asked if it had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was ordered filed and recorded, viz:

“We, the Jury, find T. A. Small, the defendant at the bar, Guilty.

J. L. CULPEPPER,
Foreman.”

The Jury upon being asked if said verdict as recorded was its verdict, each juror replied that it was. Ordered that the Jury be discharged from further

consideration hereof and be excused until further notice.

Further ordered that the matter of the pronouncing of judgment and this case be continued to February 15, 1944, and that the defendant be remanded into the custody of the U. S. Marshal and that a mittimus issue. [5]

[Title of District Court and Cause.]

VERDICT OF GUILTY

We, the Jury, find T. A. Small, the defendant at the bar Guilty.

J. L. CULPEPPER

Foreman

[Endorsed]: Filed Feb. 8, 1944. [6]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Now comes the defendant, *F. A. Small* in the above entitled action and moves the above entitled Court for an order vacating the verdict of the jury convicting said defendant and granting a new trial on the information herein for the following, and each of the following, causes materially affecting his constitutional rights, to-wit:

1. That the verdict is contrary to the evidence adduced at the trial herein.

2. That the verdict is not supported by the evidence in the case.

3. That the evidence adduced at the trial is insufficient to justify said verdict.

4. That said verdict is contrary to law.

5. That the verdict of the jury was the result of prejudice and bias to the damage of this defendant.

6. That the Court erred in refusing to direct a verdict of not guilty at the close of all the evidence in the case.

This motion is made upon the minutes of the Court and all records, files and proceedings and testimony and evidence therein.

Dated: February 15, 1944.

LOUIS R. MERCADO

FRED McDONALD

Attorney for Defendant.

[Endorsed]: Filed Feb. 15, 1944. [7]

[Title of District Court and Cause.]

MOTION FOR ARREST OF JUDGMENT

Now comes the defendant T. A. Small in the above entitled action and against whom a verdict of guilty was rendered on the 8th day of February, 1944, in the above entitled cause, and moves the Court to arrest the judgment against said defendant and to hold for naught said verdict of guilty rendered against said defendant for the following reasons:

1. That said information does not state facts sufficient to constitute a public offense.

2. That the information is uncertain, *intelligible*, ambiguous and insufficient in law to apprise the defendant of the nature of the charge against him.

3. That the above entitled Court has no jurisdiction over the person of the defendant.

4. That the defendant has been convicted without due process of law and in violation of Articles 3, 4, 5 and 6 of the amendments to the Constitution of the United States.

5. That the evidence is not sufficient to support the verdict of guilty to said information in this, that there is no evidence to show that the said defendant did sell the liquor charged in the information to said F. W. Larkin, as charged in said information.

6. That the evidence is insufficient to support the information in this, that there is no evidence to show that said defendant was a wholesaler and came within the provisions of Title 50 U.S.C.A., Sections 902(a), 904(a) and 925(b).

7. That the verdict of the jury is contrary to law.

Wherefore, because of said errors in said record herein, no lawful judgment may be rendered by the Court, this defendant prays that this motion be sustained and that the judgment of conviction against him be arrested and held for [8] naught and that he may have such other and further orders as may seem just in the premises.

LOUIS R. MERCADO

FRED McDONALD

Attorney for Defendant.

[Endorsed]: Filed Feb. 15, 1944. [9]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 15th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable A. F. St. Sure,
District Judge.

UNITED STATES OF AMERICA

vs.

T. A. SMALL

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT DENIED, JUDGMENT

This case came on regularly this day for the pronouncing of judgment. The defendant T. A. Small was present in the custody of the United States Marshal and with his attorneys, Fred. McDonald, Esq., and Louis Mercado, Esq., A. J. Zirpoli, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

The defendant was called for judgment. Mr. McDonald made a motion for new trial and a motion in arrest of judgment, which motions were ordered denied. After hearing the defendant and Mr. McDonald, and said defendant having been asked whether he has anything to say why judg-

ment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, T. A. Small, having been convicted on the verdict of the jury of guilty of the offense charged in the Information, be and he is hereby [10] committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Six (6) Months.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that this Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a County Jail.

Further ordered that bail be fixed in the sum of \$1000.00 for release of defendant pending appeal herein. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: T. A. Small, #314 Braneson Avenue, San Mateo, California.

Names and Addresses of Appellant's Attorneys: Fred McDonald and Louis R. Mercado, Room 935, Mills Building, San Francisco, California.

Offense: Violation of the Emergency Price Con-

trol Act of 1942, Title 50, U.S.C.A., Sections 902(a), 904(a) and 925(b).

That the defendant on or about the 5th day of October, 1943, at Redwood City, County of San Mateo, State of California, did wilfully and unlawfully sell to one F. W. Larkin, certain distilled spirits, to-wit: 100 cases, each of which 100 cases contained twelve one-fifth bottles of Baltimore Club Special Reserve Whiskey, at the price of \$46.50 per case, which said price of \$46.50 per case for each of said one hundred cases, each containing one-fifth bottles of Baltimore Club Special Reserve Whiskey was in excess of the maximum price established by law, to-wit: \$27.00 per case for each case containing twelve one-fifth bottles of Baltimore Club Reserve Whiskey, as said defendant then and there well knew (Maximum Price Regulation No. 445, Article VII, Section 7.8; 8F.R. 11161.)

Judgment Date: February 15, 1944.

Description of Judgment and Sentence: "Guilty".
Sentence: Six (6) months in the County Jail.

Name of Prison where now confined: County Jail of the City and County of San Francisco, State of California.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from the judgment above named upon the grounds set forth below: [12]

GROUND OF APPEAL

I.

That the learned trial Judge committed errors

in law arising during the course of the trial and erred in decisions of questions of law arising during the course of the trial.

II.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

III.

That the learned trial Judge erred in denying the motion made by counsel of the defendant for a directed and instructed verdict of "Not Guilty" at the conclusion of all the evidence in the case for the reason that taking of all said evidence in said case it is not sufficient as a matter of law to support the verdict of "Guilty".

IV.

That the information on file in the above entitled cause does not state facts sufficient to charge the defendant with the commission of a crime against the United States.

V.

That the trial Court erred in not instructing the jury to return a verdict of "Not Guilty".

VI.

That the trial Court erred in not granting the motion of the defendant for a new trial.

VII.

That the trial Court erred in denying the motion of the defendant for arrest of judgment.

Dated: February 15, 1944.

T. A. SMALL

Appellant

LOUIS R. MERCADO

FRED McDONALD [13]

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Feb. 15, 1944. [14]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes the defendant, T. A. Small, in the above entitled action who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the verdict and judgment of conviction heretofore given, made and entered against him in the above entitled cause pending in the Southern Division of the United States District Court for the Northern District of California, and files this, his Assignment of Errors, upon which he will rely in the prosecution of his said appeal to the United States Circuit Court of Appeals.

I.

That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of all of the testimony in this case.

II.

That the Court erred in refusing to instruct the jury to [15] find the defendant Not Guilty.

III.

That the Court erred in refusing to grant the defendant's motion for arrest of judgment.

IV.

That the Court erred in refusing to grant the defendant's motion for a new trial.

Wherefore said defendant, T. A. Small, prays that the judgment of said District Court be reversed and that said information against him be quashed and that he may go hence without day.

FRED McDONALD

Attorney for said Defendant.

Receipt of the above Assignment of Errors copy admitted this 31st day of March, 1944.

FRANK J. HENNESSY

United States Attorney

By VALENTINE C. HAMMACK

Assistant United States

Attorney

[Endorsed]: Filed April 7, 1944.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that the above entitled cause came on regularly for trial before the Court, with a jury, Valentine C. Hammack, Esq. appearing for the United States of America, and Fred McDonald,

Esq. appearing as counsel for the defendant T. A. Small, Honorable A. F. St Sure, Judge of said court presiding. Thereupon the following proceedings were taken and had:

The United States Attorney made an opening statement of the matters and things he expected to prove. Counsel for the defendant reserved his right to make an opening statement at the conclusion of the government's case.

MARY ROLLANDELLI,

called as a witness on behalf of the United States of America, being first duly sworn, testified in substance as follows: [17]

Direct Examination

By Mr. Hammack:

My name is Mary Rollandelli. I am a secretary. I am secretary of Rollandelli Company. Rollandelli Company is a corporation. Rollandelli Company are the distributors of Baltimore Club Special Reserve Whiskey. There was a purchase of several hundred cases made of Baltimore Club Special Reserve Whiskey by the Rollandelli Company sometime in October or November, 1943. There were 1500 cases purchased. These cases were purchased from Gordon-O'Neill Company, Inc., Distillery at \$20.40 per case, f.o.b. Our cost per case for delivery in San Francisco was \$21.21. Figuring the State tax, the ceiling price in San Francisco and vicinity per case to the retail trade for this Baltimore Club Special Reserve Whiskey was between \$26.60 and

(Testimony of Mary Rollandelli.)

\$27.00 per case, no higher. That was a case of fifths; in fact, all of this whiskey was in fifths. I have the invoice showing the purchase price of this whiskey.

(Shows witness a document).

This document shows the total amount of whiskey purchased and the price—1500 cases of Baltimore Club Special Reserve Whiskey at \$20.40 per case—\$30,600.00. That was the total price of the whiskey f.o.b. Jersey City.

(Invoice introduced in evidence and marked
“United States’ Exhibit No. 1.”)

I arrived at my ceiling price by taking the f.o.b. cost, then my freight, adding State taxes of \$1.92 and figuring a 15% mark-up for the O.P.A. ceiling. I remember an order being served on Rollandelli Company restraining them from releasing any of that whiskey sometime in November. I do not remember just about when that was served. As a result of that restraining order, no whiskey was released during the pendency of that [18] restraining order.

Cross Examination

By Mr. McDonald:

I am the secretary of the Rollandelli Company. Mr. Gene Rollandelli is my father. In reference to this whiskey, we were notified of the original cost by the distillery; the Gordon-O'Neill Company informed us of the cost of the whiskey. It is a blend whiskey. I do not know what proof it was. The

(Testimony of Mary Rollandelli.)

price was quoted by the Gordon-O'Neill Distillery. I do not know whether anyone else knew of this price besides the Rollandelli Company. We added 80c for freight per case and \$1.92 per case excise tax and a mark-up of \$3.47. That is how we arrived at the ceiling price. I do not know Mr. Small. I never saw the gentleman until I saw him here in the courtroom. The Rollandelli Company had no transaction with him at any time. The Rollandelli Company never sold any whiskey to a man by the name of F. W. Larkin. I never heard of him. The 1500 cases of liquor were delivered to the Rollandelli Company by the Gordon-O'Neill Company. An injunction was served on us restraining us from releasing any of this whiskey. This liquor was afterwards sold. None of it was sold to Mr. Larkin. It was sold to regular customers of the Rollandelli Company. The Rollandelli Company never had any transaction with F. W. Larkin. We never dealt with him or heard of him.

Q. You never heard of T. A. Small?

No. We have never had any business dealings with Mr. Small. He was not an agent for the Rollandelli Company.

F. W. LARKIN,

called as a witness for the United States, being first duly sworn, testified as follows: [19]

Direct Examination

By Mr. Hammack:

My name is F. W. Larkin. My home address is Redwood City. I am engaged in the bar business. I know the defendant, T. A. Small. I have known him for a number of years. I had occasion to have conversation with him in the early part of October, 1943, when he came to collect dues. It was in the early part of October 1943. He came to collect in my barroom from the boys who work for me. He was the business agent of the Bartenders' Union. At that time I had a conversation with Mr. Small. The conversation was that liquor was hard to get and that he was all around and maybe he would try to find where I could get some. I said, "If you can find any for me, I will appreciate it." He said, "If anything comes up, I will let you know." A little later, he said that he thought he could get ahold of some whiskey at \$46.00 per case if I would take 100 cases. I think the brand was Baltimore Club—I am not sure. I have never seen any of it. I said that I would wait and see as I knew that I could not handle that much. He quoted a price of \$46.00 per case. There was nothing said at that time about how the whiskey was to be paid for. After that, I contacted the lady across the street and another lady further up the highway. I saw Mr. Small in his office in San Mateo. I made a down payment on

(Testimony of F. W. Larkin.)

the whiskey. I paid \$19.50 per case down. My check was \$780.00, Mrs. Bertolucci's was \$185.00. Mrs. Baer produced the third check for 50 cases. I think the total was something like \$975.00. Those checks represented \$19.75 per case. I was supposed to go up and get the whiskey. He told me the name of the warehouse to get it—Rollandelli was the company that was supposed to have it. He told me this the next time I went to find out when we could get it. I had [20] given him the original check at \$19.50 a case. That was for myself, Mrs. Bertolucci and Mrs. Baer.

I took a truck and went up after the whiskey in about three weeks. Mr. Small told me to go up there. He just said, "Go up and get it, there it is." I took the balance of the purchase price with me.

Q. How much was that?

\$27.00 per case for forty cases. The check was made out to Rollandelli. I also had the checks of Mrs. Baer and Mrs. Bertolucci for the balance of the purchase price at \$27.00 per case. When I got up there, a man was just coming out with some—I do not recall—ten cases for Oakland somewhere, and he told me I had to go down to the Rollandelli Warehouse. I went down there and nobody knew anything about it down there. I went to the warehouse—they did not give me the whiskey. I went back to Rollandelli's and they said they did not know anything about it. I never received the whiskey. I got my money back from Mr. Small. He came and told me that the deal was illegal and

(Testimony of F. W. Larkin.)

he didn't want anything to do with it. He gave me back the money and I distributed it to the others. Mr. Small did not tell me there was an injunction against Rollandelli's from releasing the whiskey. It was four or five days, if I am not mistaken, or something like that, after coming to San Francisco, that Mr. Small gave me my money back.

I recognize a check dated September 5, 1943 to "Cash"—Mrs. Clara Baer's for \$975.00. I received that from Mrs. Baer. I went right up to the OPA office where Mr. Small was and gave it to him right there. I gave the check to Mr. Small. This check for \$195.00, dated October 5, 1943, is Mrs. Bertolucci's check. I gave that check to Mr. Small.

(Checks introduced in evidence.)

My own checks were cashier's checks—one of them is in the [21] amount of \$780.00 and this large one is made out to the Rollandelli Company. I cashed them back myself.

Cross Examination

By Mr. McDonald:

I have never seen a bottle of Baltimore Club Special Reserve whiskey. I have never seen that kind of whiskey in my experience. I conduct a tavern in Redwood City. I have been conducting it for 3½ years. Mr. Small is the official of the Bartenders' Union. He collects dues from two bartenders that are employed in my tavern. I am also a member of the Union. I have been such since 1908. He came in to collect the dues sometime in

(Testimony of F. W. Larkin.)

October. We discussed the shortage of liquor in San Mateo County. I told him that if the shortage could not be relieved, I would have to close my place of business. I told him that if the place closed, that probably the two bartenders that I employed would be out of a job. I told him that a number of people in Redwood City were in the same predicament and he said he would see what he could do to get me some liquor. Sometime afterwards, he came to me and told me he thought he could get me some liquor. After I found that I could handle it, I went to his office and gave him the checks. I talked with Mrs. Bertolucci and Mrs. Baer. We found out that we could pool our reserves and buy one hundred cases of the liquor. I went to Mr. Small and gave him these checks. These checks are made out to "Cash" but they are endorsed by Mr. Small. On one of them, he had written his address. I heard from him and he said to go to the warehouse and get it. It was a San Francisco warehouse. He did not tell me who to see there. I went to the warehouse they told me. I saw a man coming out with some of it for Oakland. He said he got his and I would have to go down and see Rollandelli. I went down to Mr. Rollandelli's office; it is on Broadway near Sansome. I did not see Mr. Rollandelli. [22] I do not know who was in the office; it was a little short fellow. I did not see the young lady who was here this morning. They said they did not know anything about the deal. I then returned to Redwood

(Testimony of F. W. Larkin.)

City, very disappointed. Two or three, or three or four days thereafter, Mr. Small came down and said he had found out the deal was illegal and he did not want to have anything to do with it and returned my money.

Re-direct Examination

By Mr. Hammack:

It was about three weeks from the time I gave those checks to Mr. Small when he returned the money. I did not have any idea that the ceiling price of the whiskey was \$27.00 per case. I made out the check for \$27.00 per case because it was the balance of \$46.50. I did not have any idea what the ceiling price was. I was glad to pay so much down and so much when I got the whiskey. I was glad to get it if I could keep my place of business open. I did not know that \$46.00 was in excess of the ceiling price. Right now I am paying \$41.25 for 80 proof whiskey on the legitimate market—I do not buy whiskey any other way—I am paying \$41.25. This is a seven year old whiskey. I do not buy any whiskey that is practically all brandy. I do not sell any whiskey like Baltimore Club Special Reserve whiskey—I never saw any of it and I do not know what grade it is. I do not know what proof it is. I thought it was 90 proof—I do not know. You have to use the whiskey that a legitimate house gives you; it is supposed to be fit to drink or they are not allowed to sell it under the Pure Food law. I did not think I would pick up any poison from a legitimate house. I knew that Baltimore Club whiskey was whiskey. Mr.

(Testimony of F. W. Larkin.)

Small told me it was whiskey and I took his word for it. [23]

Re-Cross Examination

By Mr. McDonald:

I have been in the liquor business a good many years. I have been in the liquor business since 1908 right here in San Francisco and I was a barkeeper before I had my own place. I have known of the firm of Rollandelli & Sons for a great number of years but have never had any dealings with it. I have known their reputation in the trade. They have a reputation for selling fairly good liquor. I know them to be an established liquor firm in San Francisco. When I heard this whiskey was coming from Rollandelli, I believed it to be legitimate whiskey. I did not think it was moonshine or anything like that. I am now paying \$41.00 per case for whiskey. That is a Mexican liquor that isn't even whiskey and I am paying \$43.00 per case for it. It is Hibernet, a Mexican liquor. You have to take so much of it to get a case. In other words, to get a case of whiskey, you have to buy a couple of cases of this Mexican liquor. In order to buy a case of whiskey, you have to buy certain cases of soda-water, Vodka or other things. This liquor has a content of 100 proof; some 90, some 100. When Mr. Small told me he could get this liquor, we had no discussion about ceiling at all. I did not think there was anything wrong with it; otherwise, I would not have had anything to do with it. The liquor was to be secured from a reputable liquor

(Testimony of F. W. Larkin.)

house. We are required by the State Board of Equalization to keep a record of our invoices. If there was any liquor in the place, I would be liable to lose my license.

GEORGE MONCHARSH,

called as a witness for the United States, testified in substance as follows: [24]

Direct Examination

By Mr. Hammack:

My name is George Moncharsh. I am a lawyer. I am Chief Enforcement Attorney for the Office of Price Administration in this district. My address is at 1355 Market Street, San Francisco, California. I have met Mr. Small in connection with my official duties. Mr. Small is the second gentleman behind the attorney. I believe I first met Mr. Small around the middle of November, 1943. The first time I saw him was directly outside my office; that is, in the main room of the Enforcement Division right outside of my office. My office in San Francisco. This is how I happened to see Mr. Small. I was in another part of the district office and I received word from one of the investigators that Mr. Small was in the office and wanted to talk to me. Thereafter I talked to Mr. Small. I went down to my office and met Mr. Small right outside of my office and he and I went into my office and had a conversation. Mr. Small was with me pretty

(Testimony of George Moncharsh.)

close to an hour and the substance of the conversation is that I discussed with Mr. Small this matter of the sale of Baltimore Club Special Reserve whiskey to Mr. Larkin. Mr. Small said that he felt some embarrassment over the situation and that he wanted to explain his connection with the Bartenders Union; the principal motive that he had in mind was to see to it that the bartenders had enough whiskey to sell; that was part of his job.

I said, "Mr. Small, aside from that, you knew, of course, that you sold the whiskey over the ceiling," and he said, "Well, I wasn't sure at the time whether I sold the whiskey"—referring to the 100 cases that was sold to Mr. Larkin.

I said, "Mr. Small, do you think \$46.50 per case was at or within the ceiling price?"

He said, "No, I realize that, but I didn't know specifically [25] what it was."

I said, "Mr. Small, didn't you know the ceiling was \$27.00 at the time you made this sale?"

He said, "I know it was somewhere around there but I didn't know exactly."

I said, "Well, Mr. Small, the main point is that you are sitting here discussing with me not the main thing, the motive you had in mind, to supply the bartenders with whiskey, but the problem of the sale of whiskey over the ceiling."

He said, "I understand that."

I asked him, "Who else did you sell this whiskey to?"

(Testimony of George Moncharsh.)

He said, "I wouldn't care to say."

I asked him with whom he had made arrangements to secure this whiskey.

He said, "I would rather not say."

So I said on his unwillingness to tell me to whom else he had sold the whiskey and with whom he had made arrangements to get the whiskey to sell, during the course of a part of the conversation, I said, "Well, Mr. Small, I would just like to know one thing. Is it physical fear that you are afraid of? That someone might do something to you physically?"

He said, "No." He said, "After all, I have been around enough and I think I can take care of myself, but in my type of work, people rely upon me to keep my mouth shut and I am going to keep my mouth shut. If I have to take the rap, I will take it."

I asked him if he knew why the whiskey was not delivered—when I say "delivered," I mean delivered to Larkin.

He said, "Yes, I know. I know there was a legal proceeding in San Francisco, and as a result of those legal proceedings the whiskey that Rollandelli had got tied up and I couldn't get it to deliver it."

A little time was spent with my asking what connection he [26] had with Rollandelli. He said that, of course, he knew that the whiskey he was selling was the Baltimore Club Special Reserve at Rollandelli's, that he was selling this whiskey of Rollandelli's to Larkin. One of the phases on this

(Testimony of George Moncharsh.)

subject: more or less toward the conclusion I had said to Mr. Small that I did not want him to do anything that might lead him to believe that I was making him any promises; that I had no authority to make any promises; that he would have to use his own judgment or rely upon the judgment of an attorney or people in whom he had trust to decide those things.

He said to me, "Well, what would happen if I were to give you the names of these people with whom I had the arrangements and the names of the other people to whom I have sold?"

I said, "Well, before I would answer you I would want you to make up your mind that you are willing to give that information, and if you are ever willing to give that information, the next step would be that I would have you taken over to the United States Attorney's office, where you would have a conversation with them and not with me."

He then went back to his original stand, that as far as he was concerned, he was not going to talk, regardless of what happened, as he used the expression several occasions in that conversation, he would take the rap.

I said, "Well, all right, Tiny, that is something for you to decide. If I may make a suggestion, I would suggest that you go home and talk to people whom you know and in whom you have confidence, and if you ever change your mind, let me know." I never heard from Mr. Small after that. That is the only conversation I have ever had with him.

(Testimony of George Moncharsh.)

Cross Examination

By Mr. McDonald:

My office is in the Furniture Mart at 1355 Market Street. [27] My office is on the third floor. Mr. Small did not see me by appointment. He was up in the office at the request of one of my investigators and I was told he wanted to see me. He told me that he was the business agent of the Bartenders' Union. I also think I knew that sometime before. I knew that they were having a great deal of difficulty getting liquor in San Mateo County; that is not confined to San Mateo County. He did not mention that he looked in the Beverage News or other papers to find what the ceiling price of this liquor was. The ceiling price of Baltimore Club is not published in any document or publication. If a consumer wanted to find out what the price was, he would call at the San Francisco District Office and ask for the price clerk who handles liquor and ask him what the ceiling price on Baltimore Club Special Reserve is. He could also go to the price panel of any War Price Rationing Board and if they could not compute it, they, in turn, would call the price desk at the San Francisco office and get the information. I am familiar with the 100 cases of whiskey that are involved in this case. I know that Mr. Larkin did not get any of the whiskey. I know that an injunction intercepted any attempt to get the liquor. I do not know whether or not the money was returned.

F. W. LARKIN

Recalled for further testimony.

Direct Examination

By Mr. Hammack:

I am familiar with the check that you showed me dated October 5, 1943. It is a check for \$780.00. That check was made out to me because I was going up and did not know who to make it out to. I gave it to Mr. Small; I endorsed it and gave it to Mr. Small and he endorsed it. That check represented the down payment on the liquor I was going to get—the down [28] payment was \$19.50 per case. The check you show me now, dated October 21, 1943, is for \$1080.00. It is made payable to Rollandelli & Company. This was the balance on the whiskey—\$27.00 per case, but I cashed it myself. Mr. Small told me that that was the balance.

Cross-Examination

By Mr. McDonald:

This check to Rollandelli Company bears the signature of F. W. Larkin and is marked "Refund to purchaser" by an official of the bank. I received the money back. This money was not paid for anything. It was received from Mr. Murray, an officer of the bank, and placed in my account; it was not paid for anything.

CLYDE O. BIRD,

called as a witness for the United States, testified as follows:

Direct Examination

By Mr. Hammack:

My name is Clyde O. Bird. I am an investigator for the Office of Price Administration. I have met the defendant in this case, T. A. Small, who is the second gentleman on that side (indicating). I first met Mr. Small about two weeks ago at the Office of Price Administration, at my office. I had a conversation with Mr. Small. Mr. Sidney Fineberg, the enforcement attorney, was present at a part of the conversation; he is in the Army—at Fort Ord, I understand. The conversation took place about two weeks ago. He came to my office and we were discussing this sale of Baltimore Club whiskey. I asked him to tell me in his own words his part of the transaction of the sale of Baltimore Club whiskey. He said that an arrangement was that he was to sell it for \$46.50 per case and that he was to get \$1.75 per case for his commission for selling it. He sold 100 [29] cases to Mr. Larkin and that he sold 300 cases to other people whose names he would not tell me without consent of his counsel.

I asked him how he came to make arrangements for the sale of the whiskey and general questions that might bring out his part in the transaction. He told me that he made arrangements to sell it for \$46.50 per case; that he sold this 100 cases here and about 300 cases more; that he collected approxi-

(Testimony of Clyde O. Bird.)

mately \$19.50 per case, which he turned over to other parties involved in the transaction, and that the ceiling price of \$27.00 per case was to be paid to the distributor, Rollanelli; that he knew it was illegal; he was the secretary of the Bartenders Union, was connected with the Bartenders' Union, and that he was very much interested in seeing that all of his members were employed, and that he was primarily interested in getting liquor for them, although he did tell me on a number of occasions in the presence of Mr. Fineberg that he was to get \$1.75 per case for his commission personally to himself. Well, he refused to tell me the names of the other people to whom he sold approximately 300 cases without permission of his attorney. He gave me the name of another Union man who was in the transaction with him. I asked him if he would be willing to testify against this other party and he told me he would not testify against him unless he got the permission of his attorney.

Cross-Examination

By Mr. McDonald:

I do not remember whether Mr. Small told me that if he could aid us in any way in finding the principals in this case, he would do that, but he did not want to bring in another unfortunate man who was sucked into the deal like he was. He refused to tell me the people he sold the liquor to and refused to tell other than what I have related here. He told me the name of a man but also told me he would not testify against this man because [30] he

(Testimony of Clyde O. Bird.)

was another Union delegate. He did not tell me that this was a married man with three children. This conversation occurred at my office about two weeks ago—I haven't the exact date. I have not been investigating this case since the beginning.

He did not tell me that there had not been one bottle of this liquor delivered. I know that there was some of this liquor delivered—I do not know how much. I know there was some Baltimore Club delivered. I don't know of my own knowledge whether Mr. Small sold it or not. I understand the whole thing has been delivered now but previous to the time I talked to Mr. Small, there had been 10 cases delivered in Alameda County. I don't know who took the order for that. I don't know if any of the liquor that Mr. Small sold was ever delivered. I don't know whether any of this liquor was ever delivered in San Mateo County.

(Witness excused.)

Mr. Hammack: At this time, may it please your Honor, I wish to offer in evidence the judgment of this Court signed by His Honor, Honorable Louis E. Goodman, an injunction, judgment for preliminary injunction against the Rollandelli Co., a corporation, and Frank De Paulo, and ask that it be marked Government's exhibit next in order.

Mr. McDonald: I can't see any possible materiality to this case. It is a transaction between De Paulo and Rollandelli, and the Office of Price Administration. Mr. Small is not a party to that case.

Mr. Hammack: It is material in this case in view of the statement made by counsel that none of the whiskey was ever delivered in this case. It shows why there was none delivered. There was an injunction restraining any being delivered.

The Court: Very well. It may be admitted. [31]

Mr. McDonald: Exception.

(Exception No. 1.)

Mr. Hammack: That is the Government's case, your Honor.

(Government rests.)

Mr. McDonald: The defendant, if your Honor please, has nothing to say, any more than the Government's case, and we will submit the matter. I should like a little time to argue it.

(Defendant rests.)

The Court: Yes. The Government rests and the defendant rests, is that right?

Mr. Hammack: Yes, your Honor.

The Court: How much time do you want for argument?

Mr. Hammack: Not over 20 minutes, your Honor.

The Court: How much do you want?

Mr. McDonald: I should like 20 minutes.

The Court: Yes.

(Whereupon a recess was taken until 2:00 o'clock p.m.)

Afternoon Session.

The Court: Ladies and Gentlemen of the Jury, I will ask you to retire for a few minutes to the jury room. We will call you when we need you. Remember the admonition heretofore given.

(Thereupon the Jury retired.)

The Court: I think it advisable to say something to you before you argue the case to the jury.

Mr. McDonald: Might I interrupt, your Honor. I would like at this time in the absence of the jury to interpose a motion for a directed verdict.

The Court: Let the record show that the motion for a directed verdict is denied and an exception noted.

(Exception No. 2.) [32]

The Court: I am going to tell the jury that there was no sale but there was an attempted sale; and I am going to read the law upon the subject. I wanted to let you know that before I gave the instructions. (After argument.) Bring the jury in.

Mr. McDonald: May the record show that I made a motion for a directed verdict in the presence of the jury?

The Court: You may renew it if you wish.

Mr. McDonald: I make a motion for a directed verdict in the presence of the jury.

The Court: Motion denied.

Mr. McDonald: Exception noted.

(Exception No. 3.)

Thereupon counsel argued the case to the jury,

and at the conclusion thereof, the Court instructed the jury as follows.

The Court (Orally): Ladies and Gentlemen of the Jury: you have here for your consideration an information containing one count, which charges substantially that the defendant T. A. Small, on or about the 5th day of October, 1943, in Redwood City, County of San Mateo, State of California, did wilfully and unlawfully sell to one F. W. Larkin at a price of \$46.50 a case, certain distilled spirits, to-wit, one hundred cases, each of which said one hundred cases contained twelve fifth bottles of Baltimore Club Special Reserve Whiskey, and that said price of \$46.50 per case for said whiskey was in excess of, and higher than, the maximum price established by law, to-wit: \$27.60 per case, as the said defendant then and there well knew.

I instruct you that the facts adduced at the trial do not support the charge in the information that defendant made an actual sale of whiskey to said Larkin, because he at no time had title to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an [33] abortive sale or a contract to sell goods which the seller was unable to carry out.

In all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged, if such attempt be itself a separate offense.

Section 4(a) of the Emergency Price Control

Act provides that it shall be unlawful to offer, solicit, attempt or agree to sell or deliver any commodity in violation of the maximum price schedule established by the Office of Price Administration.

I further instruct you that Maximum Price Regulation No. 445, Section 7.8, entitled "Compliance with this regulation," provides as follows:

"(a) No buying or selling above maximum prices.

On and after the effective date of this regulation, regardless of any contract, agreement or other obligation, no person to whom this regulation applies shall sell or supply, and no person in the course of trade or business shall buy or receive, any distilled spirits, wine or service at prices higher than the maximum price applicable to such sale under this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, prices lower than the maximum price may be charged or paid.

"(b) Evasion. The maximum prices established under this regulation shall not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by tying agreement or trade understanding; by any change in style or manner of packing; or in any other way."

I further instruct you that Maximum Price Regulation No. 445, Section 5.4, establishes the maximum ceiling price for which [34] wholesalers may sell distilled spirits as follows: The net cost to the

wholesaler, plus a 15% markup in addition thereto.

In other words, for illustration, if the total cost to the wholesale, let us say, is \$24.00 per case, his maximum price for resale to the wholesaler's customers would be fixed by adding 15% to the cost, or 15% of \$24.00, a total of \$27.60 per case.

I further instruct you that under Maximum Price Regulation No. 445, sale of distilled spirits is wholesale when made to a retailer of the same, as distinguished from the ultimate consumer.

Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him.

The information is a mere accusation against the defendant; it is not any evidence against him, and it gives rise to no presumption of guilt.

The defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the government shows the defendant to be guilty beyond a reasonable doubt, and this rule applies to every material element in the case. Mere suspicion will not authorize a conviction.

A reasonable doubt is not a mere possible doubt because everything relating to human affairs and depending upon oral evidence is open to some possible or imaginary doubt. A reasonable doubt is not a doubt which may be based upon whim or which may be based upon sympathy. A reasonable doubt means what the words import, a doubt based upon reason. It is that state of the case [35] when after a comparison and consideration of all of the evidence the jurors find their state of mind to be that they cannot say they feel an unabiding conviction to a moral certainty of the truth of the charge.

In connection with these instructions I must impress upon you that if the evidence is susceptible of two interpretations, one of innocence and one of guilt, it will be your duty to accept the interpretation of innocence.

The burden is upon the government to prove the defendant guilty. The defendant does not have to prove his innocence. The burden at all time rests upon the government; the government must prove every material allegation of the information, and the instruction that I have given you about reasonable doubt applies to every material part of this case.

You are the sole judges of the facts and of the credibility of the witnesses. You may judge the credibility of a witness by his appearance on the stand, by his intelligence, whether or not he has contradicted himself or is contradicted by others, his interest in the case, what relation, if any, he bears to the defendant in the case, and what rela-

tion he bears, if any, to the government. And you may draw such inferences which may arise in your mind which may be used by you in determining the credibility of a witness.

I will repeat: you are the sole judges of the credibility and weight of the evidence. The court has no business to tell you how to decide this case, and anything that I have said during the trial of this case or anything that I may say during the course of these instructions that may give you the idea that I have any opinion as to the guilt or innocence of the defendant, you must wholly disregard, because you are the judges of the facts; that is your responsibility, the law places it there.

The defendant here has seen fit not to take the witness [36] stand, and that is his right. He has a right to rely on what he considers the insufficiency of the evidence of the government to convict him. Our constitution provides that a man may not be compelled to be a witness against himself, and you must not hold that against the defendant in any way whatsoever. He is standing upon his rights and that is what he is entitled to do. Now, as I say, he stands mute here, and that is his privilege,—not only his privilege but his right under our procedure.

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to confer with one another in the jury room, and any juror should not hesitate to abandon his or her own view when convinced that it is erroneous. In determining what your verdict will be you are to consider only the evidence before you; any testi-

mony as to which an objection was made and sustained, and any testimony which was ordered stricken out must be wholly left out of account and disregarded.

Your verdict must be unanimous.

The clerk has prepared for your convenience a form of verdict, which reads, after the entitlement of the court and cause, "We, the jury, find the defendant, T. A. Small, the defendant at the bar"; then follows a blank line and then a blank line for the signature of the foreman. When you have agreed upon a verdict the foreman will sign it and you will be returned to court.

Have counsel any exceptions?

Mr. McDonald: No exceptions, your Honor.

Mr. Hammack: No exceptions, your Honor.

(Thereupon at 2:52 the jury retired and returned into court at 3:09 PM with a verdict of guilty.)

And now, and within due and legal time after the aforesaid [37] judgment, and within the time fixed by the trial Court for the preparation, service and filing of the Bill of Exceptions, the defendant herein serves, lodges and presents this, his Proposed Bill of Exceptions, to be used upon his appeal heretofore taken to the United States Circuit Court of Appeals for the Ninth Circuit from the aforesaid judgment and prays that said Bill of Exceptions be, by the Court, settled, approved and allowed, and that the same may be used on the appeal of said

defendant to said United States Circuit Court of Appeals.

Dated: This 31st day of March, 1943.

FRED McDONALD

Service of the within Bill of Exceptions copy admitted this 31st day of March, 1944.

FRANK J. HENNESSY

United States Attorney

By: VALENTINE C. HAMMACK

Assistant United States

Attorney. [38]

STIPULATION

It Is Hereby Stipulated that the foregoing twenty-two (22) pages truthfully set forth the proceedings upon the trial of the defendant T. A. Small and that they contain, in narrative form, all of the testimony taken upon said trial, together with all objections made by the said defendant and the rulings thereon and the exceptions noted by said defendant, and that the foregoing may be settled, allowed, certified and approved as the Bill of Exceptions in the above entitled matter;

And it is further stipulated that an Order be made by the Court that the Clerk of said Court file the same as a record in said cause and transmit

it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

FRANK J. HENNESSY

United States Attorney

By: VALENTINE C. HAMMACK

Assistant United States

Attorney.

FRED McDONALD

Attorney for Defendant.

[Endorsed]: Filed Apr. 7, 1944. [39]

ORDER SETTLING BILL OF EXCEPTIONS

Pursuant to the stipulation of counsel, it is hereby ordered that the foregoing document, containing twenty-two pages, lodged with the Clerk of this Court, entitled "Defendant's Proposed Bill of Exceptions" may be and the same is considered to truthfully set forth the proceedings upon the trial of the defendant T. A. Small and that it contains in narrative form all of the testimony taken at said trial, together with all objections made by said defendant and the rulings thereon and the exceptions noted by said defendant, and it may be and is hereby settled, allowed, certified and approved as the Bill of Exceptions in the above entitled matter;

And it is further ordered that the Clerk of the said Court file the same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Dated:

A. F. ST. SURE

Judge of the United States
District Court. [40]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the United States District Court:

The following are the papers that defendant and appellant designates as the papers necessary for the transcript on appeal in the above entitled matter:

1. Information
2. Minute Order January 4, 1944, Defendant's Plea *or* Not Guilty.
3. Minute Order January 8, 1944, Jury Impaneled, Evidence Introduced, Jury Returned Verdict of Guilty.
4. Verdict.
5. Motion for New Trial
6. Motion for Arrested Judgment
7. Minute Order—Motions for New Trial and Arrested Judgment Denied
8. Assignments of Error
9. Bill of Exceptions.

Respectfully,

FRED McDONALD

Attorney for Defendant and
Appellant.

[Endorsed]: Filed Mar. 28, 1945. [41]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered from 1 to 40, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of United States of America, Plaintiff, vs. T. A. Small, Defendant, No. 28263 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.15 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of April, A. D. 1945.

[Seal]

C. W. CALBREATH,
Clerk

By M. E. VAN BUREN
Deputy Clerk [42]

[Endorsed]: No. 10982. United States Circuit Court of Appeals for the Ninth Circuit. T. A. Small, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 12, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

FRED McDONALD,
Mills Building, San Francisco,

Attorney for Appellant.

FILED

PAUL P. O'BRIEN,
CLERK

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

This is an appeal from a judgment and order of the the United States District Court for the Northern District of California, Southern Division, the Honorable A. F. ST. SURE presiding, sentencing said appellant to serve a term of six months in the County jail.

THE INFORMATION

*In the Southern Division of the United States District Court, for the Northern District of California.—
No. 28263-S.*

UNITED STATES OF AMERICA,	}
<i>Plaintiff,</i>	

VS.

T. A. SMALL,	}
<i>Defendant.</i>	

INFORMATION

(Emergency Price Control Act of 1942; Title 50

U.S.C.A., Sections 902(a), 904(a), and 925(b).)

Comes now FRANK J. HENNESSY, United States Attorney for the Northern District of California, and by leave of Court first had and obtained informs this Court: That on or about the 5th day of October, 1943, at Redwood City, County of San Mateo, State of California, within the Southern Division of the Northern District of California, and within the jurisdiction of this Court, F. A. SMALL, (hereinafter called "the said defendant") did wilfully and unlawfully sell to one F. W. LARKIN certain distilled spirits, to-wit, 100 cases each of which said 100 cases contained twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, at a price of \$46.50 per case, which said price of \$46.50 per case for each of said

100 cases, each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, was in excess of and higher than the maximum price established by law, to-wit \$27.00 per case for each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, as the said defendant then and there well knew. (Maximum Price Regulation No. 445, Article VII, Section 7.8; 8 F.R. 11161.)

FRANK J. HENNESSY,
United States Attorney.

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

ALFRED W. WORTHINGTON, being first duly sworn, deposes and says: That he is an Investigator employed by the Office of Price Administration; that he has read the foregoing Information; that he is familiar with the facts therein alleged concerning the offense therein described, and that the same are true of his own knowledge.

ALFRED W. WORTHINGTON.

Subscribed and sworn to before me this 20th day of December, 1943.

(Seal)

E. H. Norman,
Deputy Clerk, U. S. District Court,
Nor. Dist. of California.

(Endorsed): Filed Dec. 21, 1943 (2)

THE STATUTE

Title 50 U.S.C.A., section 902-A provides:

“(a) Whenever in the judgment of the Price

Administrator (provided for in section 201) (section 921 of this Appendix) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act (sections 901-946 of this Appendix), he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act (sections 901-946 of this Appendix). So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941; *Provided*, That no such regulation or order shall contain any provision requiring the determination of costs otherwise than in accordance with established accounting methods. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a state-

ment of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. In the case of any commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be deemed necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable, and such recommendations shall be considered by the Administrator. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act (sections 901-946 of this Appendix), he may, without regard to the foregoing provisions of this subsection, issue temporary regu-

lations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Section 904 (a) of such title provides:

"It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (section 922 (b) or 925 (f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing."

Section 925 (b) of such title provides:

"Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine

of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) (section 904 of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."

Maximum Price Regulations No. 445, Article VIII, section 7.8 provides:

"Compliance with this regulation—(a) No buying or selling above maximum prices. On and after the effective date of this regulation, regardless of any contract, agreement or other obligation, no person to whom this regulation applies shall sell or supply, and no person in the course of trade or business shall buy or receive, any distilled spirits, wine or service at prices higher than the maximum price applicable to such sale under this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, prices lower than the maximum price may be charged or paid.

"(b) Evasion. The maximum prices established under this regulation shall not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by tying agreement or trade understanding; by any change in style or manner of packing; or in any other way.

"(c) Enforcement. Persons violating any provision of this regulation are subject to the criminal

penalties, civil enforcement actions and suits for treble damages provided for by the Emergency Price Control Act of 1942, and to proceedings for the suspension of licenses.”

Section 7.12 (b) of such Regulations, sub-paragraph (3) thereof, defines “Wholesaler” as follows:

“ ‘Wholesaler’ means any person (except a monopoly state or primary distributing agent) *engaged in the business* of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers.”

ABSTRACT OF THE CASE

The facts of this case are briefly (the testimony of F. W. Larkin, transcript, pages 19 to 25), that F. W. Larkin, a tavern owner in Redwood City, California, being unable to secure whiskey, discussed the matter with the appellant. The appellant stated that he would see what he could do to procure some whiskey for him and later the appellant returned and said that he could get ahold of 100 cases of a whiskey known as Baltimore Club Special Reserve at a price of \$46.00 per case. Larkin then contacted two other tavern keepers, Mrs. Bertolucci and a Mrs. Baer, and agreed to take this whiskey. According to the witness Larkin, he paid \$780.00, Mrs. Bertolucci paid \$185.00, and Mrs. Baer gave a third check to make a total amount of \$1,975.00. This money was paid to the appellant. The whiskey was supposed to be at Rollandelli's Warehouse. The amount paid down represented \$19.75 a case and Larkin was supposed to pay the balance when he went to the warehouse to get the whiskey. Larkin subsequently went to this warehouse, but did not receive

any whiskey and was told there that no one knew anything about the transaction. He never at any time received any whiskey at all. Shortly thereafter the appellant came to Larkin, told him that he had heard that there was something illegal in this transaction and that he wanted nothing further to do with it, and he returned Larkin the money that he had been paid.

Mary Rollandelli, the bookkeeper and cashier of the Rollandelli Co., was called as a witness for the United States. She testified that Rollandelli and Company had purchased a number of cases of Baltimore Club Special Reserve Whiskey from the Gordon O'Neill Co., Incorporated, distillery, at \$20.40, f.o.b., that the ceiling price of this whiskey was \$26.60 or \$27.00 a case, no higher. She testified that a restraining order was served upon the Rollandelli Company sometime in November, and that no whiskey was delivered during the pendency of those proceedings. She further testified on cross-examination, that she did not know Mr. Small, the appellant here, and had never seen him until the morning of the trial; that the Rollandelli Company never had any transaction or transactions with him at any time; that the Rollandelli Company never sold any whiskey to the witness Larkin; that she had never heard of him; and that the whiskey was sold at the ceiling price under the direction of the Office of Price Administration to customers of the Rollandelli Company. None of it was sold to Larkin, and he was not a customer of the Company, and she had never heard of him.

THE QUESTIONS INVOLVED

That there is no evidence to support the verdict of "guilty" to the charges laid in the Information in this.

I.

That there is no evidence to show that the said appellant *did sell* the liquor charged in the Information to said F. W. Larkin, as charged in said Information.

II.

That the evidence is not sufficient to support the verdict of "guilty" in this, that there is no evidence to show that section 7.8, Article VII of Maximum Price Regulations No. 445 applies to this appellant for the reason that there is no evidence to show that this appellant was a wholesaler, as defined by subdivision (3) of section 7.12 (b) of the said Maximum Price Regulations.

ARGUMENT

I.

It should be noted in this case that the appellant is accused of a specific offense in the Information. The Information in this case charges that he did willfully *sell* to one F. W. Larkin certain distilled spirits, to-wit, 100 cases, each said 100 cases containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey at a price of \$46.50 per case, which said price was in excess of and higher than the maximum price established by law, to-wit, \$27.00 per case for each case containing twelve 5th-bottles of said whiskey, as the said defendant then and there well knew. The evidence did not support that charge.

There is no evidence that the witness Larkin ever received any whiskey. The evidence is that he subsequently received back the money that he paid the appellant. Evidence is that the appellant at no time had any whiskey which he could have sold the witness. The evidence is (the testimony of Mary Rollandelli, transcript pages 16 to 18), that the appellant had no transaction with the Rollandelli Company, that he was not the agent for the Rollandelli Company, and there is no evidence that there was any agreement with the Rollandelli Company for them to sell any whiskey to Larkin. The Trial Court admitted this in the Instructions to the Jury when at page 36 of the transcript it instructed the Jury:

“I instruct you that the facts adduced at the trial do not support the charge in the Information, that the defendant made an actual sale of whiskey to said Larkin because he at the time had no title to the whiskey, nor was he able to secure such title. It might be found from the evidence, however, that there was an abortive sale or contract to sell goods which the seller was unable to carry out.

“In all criminal cases the defendant may be found guilty of any offense which is necessarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged if such an attempt itself be a separate offense. Sec. 4 (a) of the Emergency Price Control Act provides: ‘That it shall be unlawful to offer, solicit, attempt or agree to sell or deliver any commodity in violation of the Maximum Price Schedule, established by the Office of Price Administration.’”

However, the verdict of the Jury (transcript, page 7)

did not find the defendant guilty of an "abortive sale or contract to sell goods," or of "an attempt to commit the offense charged," but merely found the defendant guilty, as charged in the Information. This verdict is not supported by the evidence, and therefore must be set aside. The Court further instructed the Jury (transcript, page 38):

"Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey here involved was restrained from sale by an Order of this Court. But, as I have said to you, if after a consideration of all the evidence of the case and applying thereto the instructions I will give you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise, you must acquit him."

The only interpretation that can be put upon this Instruction of the Court is that if the Jury found from the evidence that there was an attempt of sale they could find the appellant guilty of such an attempt. They could not under the evidence justly and legally find him guilty of a sale. For, as the Court had instructed them, there was no sale and by finding him guilty of such sale, as they clearly did by their verdict, such verdict is not supported by and is contrary to the evidence in the case and therefore should be set aside.

II.

From the testimony of the witness Larkin that he was a tavern owner and from the entire theory of the Govern-

ment's case, in order to convict the appellant of a violation of Maximum Price Regulations 445, Article VII, section 7.8, he must have been a person "to whom this Regulation applies." To determine the persons to whom such Regulation applies we must look to section 7.12 (b) which gives the definition of persons to whom this Regulation refers. Subdivision (3) of subsection (b) defines a "wholesaler" as "any person except a monopoly state or primary distributing agent engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof to persons other than consumers." The question now presents itself: Was the appellant "engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof?" The phrase "engaged in business" means more than a single act or transaction, as has been universally held by the Courts. When employed as descriptive of an occupation it conveys the idea of business being done not from time to time but all of the time. In the instant case, there was no evidence presented (except possibly the extra judicial statements of the defendant to certain officers of the Office of Price Administration (which were contradicted by the evidence of Mary Rollandelli) that the appellant ever sold one drop of whiskey. In fact, the Court in its Instructions stated that the evidence showed, "that Mr. Small did not have any whiskey, nor could he get it." (Transcript, page 38.) "He therefore had no whiskey to sell, and therefore was not in a position to deliver any." From this it is clear that he could not be and was not "a person engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof to consumers", and the evidence utterly

fails to prove that he was a "wholesaler", as the term is defined in article VII of Maximum Price Regulations 445. Therefore, if he were not a "wholesaler", as so defined in that Regulation, he was not a person to whom section 7.8 of the same Regulation applied, and, having failed to bring it within the purview of the definition of a "wholesaler" the prosecution failed to prove a material element of their case, and the verdict of the Jury, finding the defendant guilty and that he did "willfully and unlawfully sell to one F. W. Larkin certain distilled spirits" was not supported by the evidence. Summing up the evidence upon which the Jury found the appellant guilty and that he did willfully and unlawfully sell to one F. W. Larkin certain distilled spirits, to-wit, 100 cases, each of which said 100 cases contained twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, at a price of \$46.50 per case, which said price of \$46.50 per case for each of said 100 cases, each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, was in excess of and higher than the maximum price established by law, to-wit, \$27.00 per case for each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, as said defendant then and there well knew, we have:

(1) That the appellant received the sum of \$19.75 per case from the witness Larkin, being the amount of whiskey that the said witness hoped to purchase.

(2) That, although the witness Larkin testified that it was his understanding that he was to pay an additional \$27.00 per case to the Rollandelli Company, there is no evidence whatsoever, and in fact, the evidence is to the contrary (testimony of Mary Rollandelli, pages 16-18

of the transcript), that the Rollandelli Company knew nothing of any such understanding; and that there is no evidence that such sum was ever paid them. The evidence is that the Rollandelli Company had no connection with the appellant. The evidence is that the appellant was not their agent. The evidence is that when the witness Larkin went to procure the whiskey, his check was not accepted by the Rollandelli Company; that he was told that the Rollandelli Company knew nothing of the transaction; that he returned the check that he procured for the Rollandelli Company to the bank and received his money back; that the appellant subsequently returned the money that he had received; and that the witness Larkin never received any liquor.

These facts certainly cannot justify a verdict that the appellant did willfully and unlawfully sell certain distilled spirits, and that is what the Jury found by its verdict. Further, although the Court instructed the Jury "that they might find the defendant guilty of an attempt of an abortive sale", they did not do so. Reading of the verdict, together with the Information, shows that they found him guilty as charged in the Information, and not of an attempt or an abortive sale. For this reason the verdict is not supported by the evidence. In fact, it is contrary to all of the evidence in the case and should be set aside.

Further, the prosecution chose to charge the appellant with selling whiskey in violation of Maximum Price Regulations 445, Article VII, section 7.8. In order to do this it was a necessary element of the offense that they must prove that he was a person to whom that section applied. From the evidence and by the Instructions of the Court it is shown that their theory was that he was

a “wholesaler”. In order to be a “wholesaler” it was necessary to bring him within the purview of the definition of a “wholesaler”, as set forth in section 7.12 of the same Article and Regulation. This the appellant believes they have failed to do and, having failed to do so, they failed in a material element in their proof, and the appellant is entitled to a reversal of the judgment against him.

From the foregoing it is respectfully submitted that the judgment appealed from must be reversed.

Respectfully submitted,

FRED McDONALD,

Attorney for Appellant.

No. 10,982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

REYNOLD H. COLVIN,

Assistant United States Attorney,

Post Office Building, San Francisco 2, California,

Attorneys for Appellee.

FILED

SEP 11 1945

PAUL P. O'BRIEN,
CLERK

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No. 10,982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

This is an appeal from a judgment and order made by the United States District Court for the Southern Division of the Northern District of California, sentencing appellant on an information containing one count, following appellant's conviction on the same, to serve a term of six months in the county jail.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the trial Court by Title 28 U.S.C.A., Section 41 (2), and upon this Court by Title 28 U.S.C.A., Section 225.

APPELLANT'S ASSIGNMENT OF ERRORS.

The defendant, T. A. Small, in the above entitled action, has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the verdict and judgment of conviction heretofore given, made and entered against him in the above entitled cause pending in the Southern Division of the United States District Court for the Northern District of California and files this, his assignment of errors, upon which he will rely in the prosecution of his said appeal to the United States Circuit Court of Appeals.

I.

That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of all of the testimony in this case.

II.

That the Court erred in refusing to grant the defendant's motion for arrest of judgment.

III.

That the Court erred in refusing to grant the defendant's motion for a new trial.

FACTS OF THE CASE.

F. W. Larkin, a tavern owner in Redwood City, California, being unable to secure whiskey, discussed the matter with the appellant who was the business

manager of the Bartenders' Union. The appellant stated that he would see what he could do to procure some whiskey for the latter. The appellant returned and said that he could get ahold of 100 cases of a whiskey known as Baltimore Club Special Reserve at a price of \$46.00 per case. Larkin then contacted two other tavernkeepers, Mrs. Bertolucci and Mrs. Baer, and agreed to take this whiskey. According to the witness, Larkin, he paid \$780.00, Mrs. Bertolucci paid \$185.00 and Mrs. Baer gave a third check to make a total amount of \$1975.00. This money was paid to the appellant. The whiskey was supposed to be at Rollandelli's warehouse. The amount paid down represented \$19.75 per case and Larkin was supposed to pay the balance when he went to the warehouse to get the whiskey. Larkin subsequently went to this warehouse but did not receive the whiskey and was told there that no one knew anything about the transaction. He never at any time received any whiskey at all. Shortly thereafter the appellant came to Larkin, told him that he had heard there was something illegal in the transaction and wanted nothing further to do with it, and he returned to Larkin the money that he had been paid. (Tr. pp. 19-21.)

Mary Rollandelli, the bookkeeper and cashier of the Rollandelli Company, was called as a witness for the United States. She testified that Rollandelli & Company had purchased a number of cases of Baltimore Club Special Reserve Whiskey from the Gordon-O'Neill Company, Inc., Distillery at \$20.40 per case, f.o.b. That the ceiling price of this whiskey was \$26.60

or \$27.00 a case, no higher. She testified that a restraining order was served upon the Rollandelli Company some time in November and that no whiskey was delivered during the pendency of those proceedings. She further testified on cross-examination that she did not know Mr. Small, the appellant here, and had never seen him until the morning of the trial; that the Rollandelli Company never had any transaction or transactions with him at any time; that the Rollandelli Company never sold any whiskey to the witness Larkin; that she had never heard of him; and that the whiskey was sold at the ceiling price under the direction of the Office of Price Administration to customers of the Rollandelli Company. None of it was sold to Larkin and he was not a customer of the company and she had never heard of him. (Tr. pp. 16-18).

George Moncharsh, Chief Enforcement Attorney for the Office of Price Administration in this district, testified that he had a conversation with Mr. Small, the appellant, around the middle of November, 1943, at his office in San Francisco; that he discussed with Mr. Small the matter of the sale of Baltimore Club Special Reserve Whiskey to Mr. Larkin. Mr. Small said that he felt some embarrassment over the situation and that he wanted to explain his connection with the Bartenders' Union; the principal motive that he had in mind was to see to it that the bartenders had enough whiskey to sell, that was part of his job. (Tr. pp. 25-26.)

Mr. Moncharsh further said: "Mr. Small, didn't you know the ceiling was \$27.00 at the time you made this sale?" Appellant replied: "I knew it was somewhere around there but I didn't know exactly." Moncharsh said: "Well, Mr. Small, the main point is that you are sitting here discussing with me, not the main thing, the motive you had in mind to supply the bartenders with whiskey, but the problem of the sale of whiskey over the ceiling." Appellant replied: "I understand that." Moncharsh asked him: "Who else did you sell this whiskey to?" Appellant replied: "I wouldn't care to say." (Tr. pp. 26-27.)

Moncharsh further testified that he asked him if he knew why the whiskey was not delivered—"when I say 'delivered' I mean delivered to Larkin". He said: "Yes, I know. I know there was a legal proceeding in San Francisco and as a result of those legal proceedings the whiskey at Rollandelli's had got tied up and I couldn't get it to deliver it." Moncharsh further testified: "A little time was spent with my asking what connection he had with Rollandelli. He said that, of course, he knew that the whiskey he was selling was the Baltimore Club Special Reserve at Rollandelli's, that he was selling this whiskey of Rollandelli's to Larkin." (Tr .p. 27.)

Moncharsh further testified: "He said to me, 'Well, what would happen if I were to give you the names of these people with whom I had the arrangements and the names of the other people to whom I have sold?' " (Tr. pp. 27-28.)

Clyde O. Bird, an Investigator for the Office of Price Administration, testified that he had a conversation with the appellant at the Office of Price Administration offices. Bird testified: "The conversation took place about two weeks ago. He came to my office and we were discussing this sale of Baltimore Club whiskey. I asked him to tell me in his own words his part of the transaction of the sale of Baltimore Club whiskey. He said that an arrangement was that he was to sell it for \$46.50 per case and that he was to get \$1.75 per case for his commission for selling it. He sold 100 cases to Mr. Larkin and that he sold 300 cases to other people whose names he would not tell me without consent of his counsel."

Bird continued: "I asked him how he came to make arrangements for the sale of the whiskey and general questions that might bring out his part in the transaction. He told me that he made arrangements to sell it for \$46.50 per case; that he sold this 100 cases here and about 300 cases more; that he collected approximately \$19.50 per case, which he turned over to other parties involved in the transaction and that the ceiling price of \$27.00 per case was to be paid to the distributor, Rollandelli; that he knew it was illegal; he was the secretary of the Bartenders' Union, was connected with the Bartenders' Union, and that he was very much interested in seeing that all of his members were employed and that he was primarily interested in getting liquor for them, although he did tell me on a number of occasions in the presence of Mr. Fineberg that he was to get \$1.75 per case for his commission

personally to himself. Well, he refused to tell me the names of the other people to whom he sold approximately 300 cases without permission of his attorney.” (Tr. pp. 31-32.)

ARGUMENT.

I.

THE PROOF OF AN ATTEMPT TO SELL THE LIQUOR CHARGED IN THE INFORMATION PROPERLY SUPPORTED THE VER- DICT OF GUILTY.

The information in this case charged in substance that the defendant “* * * did wilfully and unlawfully sell to one F. W. Larkin, certain distilled spirits * * * at a price of \$46.50 per case, which said price * * * was in excess of and higher than the maximum price established by law, to-wit, \$27.00 per case for each case * * * as the said defendant then and there well knew.”

The Court instructed the jury in part as follows:

“I instruct you that the facts adduced at the trial do not support the charge in the information that defendant made an actual sale of whiskey to said Larkin, because he at no time had title to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an abortive sale or a contract to sell goods which the seller was unable to carry out.

“In all criminal cases the defendant may be found guilty of an offense the commission of which is neces-

sarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged, if such attempt be itself a separate offense.

* * * * *

“Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him.”

Therefore, whether proof of an attempt to sell supported the verdict is at issue in this case.

The Statutes of the United States provide directly for this situation:

Title 18, *U.S.C.A.*, Section 565.

“§ 565. *Verdicts; less offense than charged.* In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense.” (R. S. § 1035.)

The attempt to sell in violation of the maximum price control regulations promulgated under the

Emergency Price Control Act is itself a separate offense. Title 50 U.S.C.A. Appx., Section 904-A, provides:

“It shall be unlawful, regardless of any contract agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act in violation of any regulation or order under section 2 (section 902 of this appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this appendix), or of any regulation, order or requirement under section 202(b) or section 205(f) (section 922(b) or 925(f) of this appendix), *or to offer, solicit, attempt, or agree to do any of the foregoing.*” (Italics ours.)

The rule that the proof of an attempt will uphold a conviction under the indictment where the attempt to commit the crime is itself an offense has been recognized in this Circuit. See

Sekinoff v. United States (CCA-9), 283 Fed. 38.

The situation here at issue is squarely within the plain meaning and forthright language of the statute. Appellant contends that there is a disparity between the proof of an attempt to sell and the verdict of guilty as to the charge of selling itself. Obviously, no such statute as Title 18 U.S.C.A. Section 565 would be necessary where the information itself charges the defendant with an attempt. If the statute is not appli-

cable to the reconciliation of this inconsistency between pleading and proof then it is mere legalistic foppery and legislative superfluity.

II.

THE DEFENDANT WAS ENGAGED IN THE BUSINESS OF BUYING AND SELLING DISTILLED SPIRITS.

The evidence clearly shows that the defendant offered to sell, supply, and to transfer to Larkin 100 cases of whiskey for which the defendant received payment from Larkin. However, the whiskey was not delivered to Larkin and the moneys received by the defendant were returned to Larkin. In addition to this offer is the uncontroverted testimony that the appellant was selling this whiskey for \$46.50 a case and that he was to get \$1.75 a case for his pay—commission—for selling it. The appellant had sold approximately 300 cases to other people. This evidence establishes that the appellant, T. A. Small, was engaged in the business of buying and selling whiskey.

Unfortunately, there is much confusion in the cases interpreting the language, “engaged in the business of” and “doing business”. This confusion can be readily ascertained by a reading of the 38 page chapter on Business in Volume 12 of *Corpus Juris Secundum*, commencing at page 761. Most of the cases cited in the article deal with taxation matters and a determination of when a person is engaged in business for tax purposes, a class of cases hardly applicable to

the situation which now confronts this Court. However, the definition apparently most quoted in the cases appears to be that of the Supreme Court in the case of *Flint v. Stone Tracy Company*, 220 U. S. 107, 171, wherein the Court said:

“It remains to consider whether these corporations are engaged in business. ‘Business’ is a very comprehensive term and embraces everything about which a person can be employed. Black’s Law Dict., 158, citing *People v. Commissioner of Taxes*, 23 N.Y. 242, 244. ‘That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.’ Bouvier’s Law Dictionary, Vol. I, p. 273.”

See also:

Daggett v. Burnet, 65 F. (2d) 191, 193.

This definition of course does not present a yardstick by which we can accurately measure a person’s activities and thereby determine whether or not he is engaged in a particular business. “The decision in each instance must depend upon the particular facts before the Court.” *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 516.

Did the contract to sell 100 cases to Larkin and the facts surrounding the same, and the admitted sale of (or offer to sell) 300 cases to other people occupy the time, attention and labor of Small for the purpose of profit? We submit that it did. He was to receive a profit of \$1.75 per case and he was rendering these services not for pleasure or as an isolated transaction, with no business purpose, but as “mercantile trans-

actions''. (*Webster's New International Dictionary, Second Edition.*) If the transaction occupied his time for purposes of profit it matters not that his primary occupation was that of a labor representative of the Bartenders' Union.

Likewise, the fact that no sales may ever have been completed is immaterial since many business ventures end in a loss or are terminated for various reasons before they have hardly started. Here apparently, an injunction (and subsequent arrest of the appellant) terminated the business transactions of the appellant before he could complete the same. If the motive was a profit motive, and time and attention were expended to promote the same, such time and attention make the giver thereof a person engaged in business.

CONCLUSION.

It is respectfully submitted that the evidence is sufficient to sustain the verdict of guilty, that appellant has shown no error and that the judgment should be affirmed.

Dated, San Francisco, California,
September 10, 1945.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

REYNOLD H. COLVIN,

Assistant United States Attorney,

Attorneys for Appellee.

No. 10,982

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

FRED McDONALD,

Mills Tower, San Francisco,

Attorney for Appellant.

FILED

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PAUL P. O'BRIEN,
CLERK

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No. 10,982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

The defendant has appealed from the judgment of the district court sentencing him to imprisonment for six months after a jury had found him guilty of violating the Emergency Price Control Act of 1942.

STATEMENT OF JURISDICTION.

Appellant was charged with violating the Emergency Price Control Act of 1942 (50 U.S.C.A. Appx., secs. 902-946), at a place within the jurisdiction of the district court (T. 2-3). The district court had jurisdiction under the Act. (50 U.S.C.A. Appx., sec. 925 (c).)

Final judgment sentencing appellant to imprisonment after conviction was entered in the district court

on February 15, 1944. (T. 10-11.) An appeal therefrom to this court was filed the same day. (T. 11-14.) The jurisdiction of this court to review the final judgment of the district court is therefore sustained by section 128 of the Judicial Code. (28 U.S.C.A., sec. 225.)

STATEMENT OF THE CASE.

The Information against defendant contained a single count, —unlawful sale to one F. W. Larkin of 100 cases of Baltimore Club Special Reserve Whiskey at a price “in excess of and higher than the maximum price established by law”. (T. 2-3.) Parenthetical references were made in the Information to the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 445. (T. 2-3.) Pertinent parts of the said Act and Regulation will be set out verbatim or appropriately summarized in a latter part of this brief. To this Information the appellant entered a plea of “not guilty”. (T. 4.)

The Government produced four witnesses at the trial and their testimony may be summarized briefly.

F. W. Larkin, a tavern owner in Redwood City, California, being unable to secure whiskey, discussed the matter with the appellant. The appellant stated that he would see what he could do to procure some whiskey for him and later the appellant returned and said that he could get ahold of 100 cases of whiskey known as Baltimore Club Special Reserve at a price of \$46.00 per case. Larkin then contacted

two other tavern keepers, Mrs. Bertolucci and a Mrs. Baer, and agreed to take this whiskey. According to the witness Larkin, he paid \$780.00, Mrs. Bertolucci paid \$185.00, and Mrs. Baer gave a third check to make a total amount of \$1,975.00. This money was paid to the appellant. The whiskey was supposed to be at Rollandelli's Warehouse. The amount paid down represented \$19.75 a case and Larkin was supposed to pay the balance when he went to the warehouse to get the whiskey. Larkin subsequently went to this warehouse, but did not receive any whiskey and was told there that no one knew anything about the transaction. He never at any time received any whiskey at all. Shortly thereafter the appellant came to Larkin, told him that he heard that there was something illegal in this transaction and that he wanted nothing further to do with it, and he returned Larkin the money that he had paid. (T. 19-25.)

Mary Rollandelli, the bookkeeper and cashier of the Rollandelli Co., was called as a witness for the United States. She testified that Rollandelli and Company had purchased a number of cases of Baltimore Club Special Reserve Whiskey from the Gordon O'Neill Co., Incorporated, distillery, at \$20.40, f.o.b., that the ceiling price of this whiskey was \$26.60 or \$27.00 a case, no higher. She testified that a restraining order was served upon the Rollandelli Company sometime in November, and that no whiskey was delivered during the pendency of those proceedings. She further testified on cross-examination, that she did not know Mr. Small, the appellant here, and had never seen

him until the morning of the trial; that the Rollandelli Company never had any transaction or transactions with him at any time; that the Rollandelli Company never sold any whiskey to the witness Larkin; that she had never heard of him; and that the whiskey was sold at the ceiling price under the direction of the Office of Price Administration to customers of the Rollandelli Company. None of it was sold to Larkin, and he was not a customer of the Company, and she had never heard of him. (T. 16-18.)

George Moncharsh, Chief Enforcement Attorney for the Office of Price Administration in this district, testified that he had a conversation with Mr. Small, the appellant, around the middle of November, 1943, at his office in San Francisco; that he discussed with Mr. Small the matter of the sale of Baltimore Club Special Reserve Whiskey to Mr. Larkin. Mr. Small said he felt some embarrassment over the situation and that he wanted to explain his connection with the Bartenders' Union; the principal motive that he had in mind was to see to it that the bartenders had enough whiskey to sell, that was part of his job. (T. 25-26.) Mr. Small said that he knew the ceiling price of the whiskey was somewhere around \$27.00; that the whiskey was not delivered to Larkin because the whiskey at Rollandelli's had been tied up by legal proceedings in San Francisco, and that the whiskey he was selling to Larkin was the Baltimore Club Special Reserve at Rollandelli's. (T. 26-28.)

Clyde O. Bird, an Investigator for the Office of Price Administration, testified that he had a con-

versation with the appellant at the Office of Price Administration offices. Appellant then said his part of the transaction of the sale of the Baltimore Club whiskey was to sell it for \$46.50 per case and that he was to get \$1.75 per case for his commission for selling it; that he sold 100 cases to Larkin and had sold 300 cases to other people whose names he would not tell without consent of his counsel; that he collected approximately \$19.50 per case, which he turned over to other parties involved in the transaction and that the ceiling price of \$27.00 per case was to be paid to the distributor, Rollandelli; that he knew it was illegal; that he was secretary of the Bartenders' Union and very much interested in seeing that all of its members were employed and that he was primarily interested in getting liquor for them; and that he was to get \$1.75 per case for his commission personally to himself. (T. 31-32.)

When the Government rested its case, the appellant also rested (T. 34) and moved for a directed verdict which the court denied and an exception was noted (T. 35). In denying the motion the court said, "I am going to tell the jury that there was no sale but there was an attempted sale". (T. 35.) The information was in no way amended, nor was a count added charging appellant with attempted sale. Among the instructions given to the jury were these:

"I instruct you that the facts adduced at the trial do not support the charge in the information that defendant made an actual sale of whiskey to said Larkin, because he at no time had title

to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an abortive sale or a contract to sell goods which the seller was unable to carry out." (T. 36.)

"Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him." (T. 38.)

The verdict of the jury was as follows:

"We, the Jury, find T. A. Small, the defendant at the bar Guilty.

J. L. Culpepper
Foreman". (T. 7.)

Following denial of a motion for new trial (T. 7-8), and a motion in arrest of judgment (T. 8-9), the judgment entered by the court contained this provision:

"Ordered and Adjudged that the defendant, T. A. Small, having been convicted on the verdict of the jury of guilty of the offense charged in the Information, be and he is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Six (6) Months." (T. 11.)

The question presented on the appeal and thus raised by the motion for directed verdict is whether the conviction and judgment are supported by the evidence.

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON.

Appellant relies upon his assigned errors Nos. I and II. (T. 14.)

ARGUMENT OF THE CASE.

Summary of Argument.

The Information was confined to the charge that appellant unlawfully sold whiskey at a price higher than the maximum price established by law. The evidence was and is admittedly insufficient to support a conviction on that charge. Appellant was therefore entitled to an acquittal on that charge and it was therefore error for the court to deny his motion for a directed verdict. The offense of offering for sale or attempting to sell at a price higher than the maximum price established by law is a separate and distinct crime. Nevertheless, the court told the jury that it could convict appellant of the charge contained in the Information on evidence that he offered for sale or attempted to sell the whiskey. By its verdict, the jury found him guilty of the charge contained in the Information. By its judgment, the court sentenced him to imprisonment on that charge. As the evidence will not support the conviction, the judgment should

be reversed. Moreover, the evidence was and is insufficient in another respect. The evidence did not establish that appellant was a "wholesaler" or subject to the Maximum Price Regulations. For this latter reason the judgment should also be reversed.

1. THE CONVICTION AND JUDGMENT ARE NOT SUPPORTED BY THE EVIDENCE AND THE JUDGMENT SHOULD THEREFORE BE REVERSED.

Assignment of Error No. I. (T. 14.) That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of all of the testimony in the case.

Assignment of Error No. II. (T. 14.) That the Court erred in refusing to instruct the jury to find the defendant Not Guilty.

As stated, the Information contained a single count or charge,—unlawful sale of whiskey at a price higher than the maximum price established by law. (T. 2-3.) That the Emergency Price Control Act of 1942 empowered the Price Administrator to establish maximum prices, is not disputed on this appeal. (50 U.S.C.A. Appx., sec. 902 (a).) Nor is it disputed that the Price Administrator duly established a maximum price for the whiskey involved in the record and that the evidence would support a finding that appellant, if a "wholesaler", offered for sale or attempted to sell the whiskey at a price higher than the maximum price established by law. And it is conceded on the appeal that the offenses of offering for sale or at-

tempting to sell is an equal crime, under the Act, with actual sale and subject to the same penalties. The Act provides:

“It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * or otherwise to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (sections 922 (b) or 925 (f) of this Appendix), *or to offer, solicit, attempt, or agree to do any of the foregoing.*” (50 U.S.C.A. Appx., sec. 904 (a).) (Emphasis added.)

“Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), * * * shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of section 4 (c) (section 904 (c) of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. * * * ” (50 U.S.C.A. Appx., sec. 925 (b).)

From the summary of the evidence appearing in the statement of the case herein it is very apparent that the charge of sale contained in the Information was not substantiated. The evidence was and is insufficient to support a conviction on that charge. Ap-

pellant moved for a directed verdict at the close of the testimony on both sides and his motion was denied and an exception noted. (T. 35.) This motion should have been granted and the error of the court is palpable.

The prejudicial effect of the error is reflected in what subsequently occurred. That the offense of offering for sale or attempting to sell is a separate and distinct crime under the Act, may not be doubted from the first section above quoted. (50 U.S.C.A. Appx., sec. 904 (a).) Thus it has been held that under the Act the charge of offering for sale is not merged in a conviction for unlawful sale under an Information containing two counts, one for unlawful sale and the other for unlawfully offering for sale, and that a defendant may consistently be found guilty on both counts and punished for both. (*United States v. Weiss*, D. C. N. Y., 57 F. Supp. 747, 749.) Here the court told the jury that it could find the appellant guilty of the offense charged in the Information, namely, unlawful sale, on evidence of unlawful offering for sale or attempting to sell. (T. 38.) Here the jury accepted the invitation of the court, its verdict reading, "We, the Jury, find T. A. Small, the defendant at bar Guilty". (T. 7.) This must be interpreted as a verdict that the defendant was guilty of the offense charged in the Information. In this connection it was said in *St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 1010, 38 L. Ed. 936:

"By the Revised Statutes of the United States, it is provided that 'in all criminal cases the de-

fendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged; provided, that such attempt be itself a separate offense.' Section 1035. It is therefore contended that as the verdict was generally, 'Guilty,' and did not, in terms, indicate of what particular offense the accused was found guilty, the judgment should have been arrested. * * * The indictment contained but one charge,—that of murder. The accused was arraigned, and pleaded not guilty of that charge. And while the jury had the physical power to find him guilty of some lessor crime necessarily included within one charged, or of an attempt to commit the offense, the law will support the verdict with a very fair intendment, and therefore will, by construction, supply the words 'as charged in the indictment.' The verdict of 'guilty' in this case will be interpreted as referring to the single offense specified in the indictment, and this principle has been incorporated into the statute laws of some of the states; as in California whose Penal Code declares that a verdict of 'Guilty,' or 'Not Guilty,' shall import a conviction or acquittal of the offense charged in the indictment. Section 1151."

To the same effect is *United States v. Martini*, D.C. Ala. 42 F. Supp. 502, 510, 511.

And here the court sentenced appellant to imprisonment on conviction "of the offense charged in the Information". (T. 11.)

Thus it is plain that although the evidence was and is insufficient to support the charge contained in the Information, the appellant was nevertheless convicted of that charge and faces imprisonment thereon unless this court intervenes and reverses the judgment. The judgment should accordingly be reversed.

Moreover, the insufficiency of the evidence may be demonstrated in another respect. Among the instructions given to the jury were these:

“I further instruct you that Maximum Price Regulation No. 445, Section 7.8, entitled ‘Compliance with this regulation,’ provides as follows:

‘(a) No buying or selling above maximum prices.

On and after the effective date of this regulation, regardless of any contract, agreement or other obligation, no person to whom this regulation applies shall sell or supply, and no person in the course of trade shall buy or receive, any distilled spirits, wines or service at prices higher than the maximum price applicable to such sale under this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, prices lower than the maximum price may be charged or paid.

‘(b) Evasion. The maximum prices established under this regulation shall not be evaded by direct or indirect methods, whether by finder’s fee, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by any change in style or manner of packing; or in any other way.’ ” (T. 37.)

“I further instruct you that Maximum Price Regulation No. 445, Section 5.4, establishes the maximum ceiling price for which wholesalers may sell distilled spirits as follows: The net cost to the wholesaler, plus a 15% markup in addition thereto.

In other words, for illustration, if the total cost to the wholesale(r), let us say, is \$24.00 per case, his maximum price for resale to the wholesaler's customers would be fixed by adding 15% to the cost, or 15% of \$24.00, a total of \$27.60 per case.” (T. 37-38.)

To convict the appellant of the offense charged in the Information it was therefore necessary for the Government to establish that appellant was a “wholesaler” within the meaning of the said Regulation. Section 7.12 (b) (3) of the said Regulation defined a “wholesaler” as follows:

“ ‘Wholesaler’ means any person (except a monopoly state or primary distributing agent) *engaged in the business* of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers.” (Emphasis added.)

The state of the evidence at the time appellant moved for a directed verdict will not support a finding that he was a “wholesaler” within the meaning of the Regulation, that is, that he was “engaged in the business of buying and selling distilled spirits . . . to persons other than consumers”. From the state of the evidence it may not be said that he bought or

sold whiskey, for the evidence established that he neither bought whiskey from Rollandelli's nor sold it to Larkin. The court summed up the situation in the instructions when it said, "The evidence shows that Mr. Small did not have any whiskey, nor could he get it". (T. 38.) His sporadic and abortive efforts to obtain whiskey for others during a whiskey shortage (T. 19) would not convert him into a "wholesaler" engaged in the business of buying and selling whiskey. A single transaction, even though substantial in character, is not sufficient to amount to being "engaged in business". (*Edgewater Realty Co. v. Tenn. Coal, Iron & Railroad Co.*, D.C. Md., 49 F. Supp. 807, 814.) To be "engaged in business" there must be a "progression, continuity, or sustained activity". (*Lewellyn v. Pittsburgh, B. & L. E. R. Co.*, 3 Cir., 222 F. 177, 185.)

Additional reason therefore exists why the motion for directed verdict should have been granted.

CONCLUSION.

That a miscarriage of justice occurred in the trial court, is not susceptible to doubt. The evidence was and is wholly insufficient to support the judgment. In ruling on the motion for directed verdict the trial court recognized that the evidence was insufficient to support the charge contained in the Information. Nevertheless the case went to the jury under instructions which permitted it to find the appellant guilty

of the offense charged in the Information. The jury found him guilty thereof and did not find him guilty of any other offense. On that conviction, and solely on the charge contained in the complaint, the trial court has sentenced appellant to imprisonment. Appellant therefore respectfully submits that the judgment should be reversed.

Dated, San Francisco,
November 23, 1945.

FRED McDONALD,
Attorney for Appellant.

No. 10,982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. SMALL,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

REYNOLD H. COLVIN,

Assistant United States Attorney,

Post Office Building, San Francisco 1, California,

Attorneys for Appellee.

FILED

DEC 21 1948

PAUL P. O'BRIEN,
CLERK

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No. 10,982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. SMALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

This is an appeal from a judgment and order made by the United States District Court for the Southern Division of the Northern District of California, sentencing appellant on an information containing one count, following appellant's conviction on the same, to serve a term of six months in the county jail.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred upon the trial Court by Title 28 U. S. C. A., Section 41(2), and upon this Court by Title 28 U. S. C. A., Section 225.

APPELLANT'S ASSIGNMENT OF ERRORS.

The defendant, T. A. Small, in the above entitled action, has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the verdict and judgment of conviction heretofore given, made and entered against him in the above entitled cause pending in the Southern Division of the United States District Court for the Northern District of California and files this, his assignment of errors, upon which he will rely in the prosecution of his said appeal to the United States Circuit Court of Appeals.

I.

That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of all of the testimony in this case.

II.

That the Court erred in refusing to grant the defendant's motion for arrest of judgment.

III.

That the Court erred in refusing to grant the defendant's motion for a new trial.

FACTS OF THE CASE.

F. W. Larkin, a tavern owner in Redwood City, California, being unable to secure whiskey, discussed

the matter with the appellant who was the business manager of the Bartenders' Union. The appellant stated that he would see what he could do to procure some whiskey for the latter. The appellant returned and said that he could get ahold of 100 cases of a whiskey known as Baltimore Club Special Reserve at a price of \$46.00 per case. Larkin then contacted two other tavernkeepers, Mrs. Bertolucci and Mrs. Baer, and agreed to take this whiskey. According to the witness, Larkin, he paid \$780.00, Mrs. Bertolucci paid \$185.00 and Mrs. Baer gave a third check to make a total amount of \$1975.00. This money was paid to the appellant. The whiskey was supposed to be at Rollandelli's warehouse. The amount paid down represented \$19.75 per case and Larkin was supposed to pay the balance when he went to the warehouse to get the whiskey. Larkin subsequently went to this warehouse but did not receive the whiskey and was told there that no one knew anything about the transaction. He never at any time received any whiskey at all. Shortly thereafter the appellant came to Larkin, told him that he had heard there was something illegal in the transaction and wanted nothing further to do with it, and he returned to Larkin the money that he had been paid. (Tr. pp. 19-21.)

Mary Rollandelli, the bookkeeper and cashier of the Rollandelli Company, was called as a witness for the United States. She testified that Rollandelli & Company had purchased a number of cases of Baltimore Club Special Reserve whiskey from the Gordon-O'Neill Company, Inc., Distillery at \$20.40 per case,

f.o.b.; that the ceiling price of this whiskey was \$26.60 or \$27.00 a case, no higher. She testified that a restraining order was served upon the Rollandelli Company some time in November and that no whiskey was delivered during the pendency of those proceedings. She further testified on cross-examination that she did not know Mr. Small, the appellant here, and had never seen him until the morning of the trial; that the Rollandelli Company never had any transaction or transactions with him at any time; that the Rollandelli Company never sold any whiskey to the witness Larkin; that she had never heard of him; and that the whiskey was sold at the ceiling price under the direction of the Office of Price Administration to customers of the Rollandelli Company. None of it was sold to Larkin and he was not a customer of the company and she had never heard of him. (Tr. pp. 16-18.)

George Moncharsh, Chief Enforcement Attorney for the Office of Price Administration in this district, testified that he had a conversation with Mr. Small, the appellant, around the middle of November, 1943, at his office in San Francisco; that he discussed with Mr. Small the matter of the sale of Baltimore Club Special Reserve whiskey to Mr. Larkin. Mr. Small said that he felt some embarrassment over the situation and that he wanted to explain his connection with the Bartenders' Union; the principal motive that he had in mind was to see to it that the bartenders had enough whiskey to sell, that was part of his job. (Tr. pp. 25-26.)

Mr. Moncharsh further said: "Mr. Small, didn't you know the ceiling was \$27.00 at the time you made this sale?" Appellant replied: "I knew it was somewhere around there but I didn't know exactly." Moncharsh said: "Well, Mr. Small, the main point is that you are sitting here discussing with me, not the main thing, the motive you had in mind to supply the bartenders with whiskey, but the problem of the sale of whiskey over the ceiling." Appellant replied: "I understand that." Moncharsh asked him: "Who else did you sell this whiskey to?" Appellant replied: "I wouldn't care to say." (Tr. pp. 26-27.)

Moncharsh further testified that he asked him if he knew why the whiskey was not delivered—"when I say 'delivered' I mean delivered to Larkin". He said: "Yes, I know. I know there was a legal proceeding in San Francisco and as a result of those legal proceedings the whiskey at Rollandelli's had got tied up and I couldn't get it to deliver it." Moncharsh further testified: "A little time was spent with my asking what connection he had with Rollandelli. He said that, of course, he knew that the whiskey he was selling was the Baltimore Club Special Reserve at Rollandelli's, that he was selling this whiskey of Rollandelli's to Larkin." (Tr. p. 27.)

Moncharsh further testified: "He said to me, 'Well, what would happen if I were to give you the names of these people with whom I had the arrangements and the names of the other peoples to whom I have sold?' " (Tr. pp. 27-28.)

Clyde O. Bird, an Investigator for the Office of Price Administration, testified that he had a conversation with the appellant at the Office of Price Administration offices. Bird testified: "The conversation took place about two weeks ago. He came to my office and we were discussing this sale of Baltimore Club whiskey. I asked him to tell me in his own words his part of the transaction of the sale of Baltimore Club whiskey. He said that an arrangement was that he was to sell it for \$46.50 per case and that he was to get \$1.75 per case for his commission for selling it. He sold 100 cases to Mr. Larkin and that he sold 300 cases to other people whose names he would not tell me without consent of his counsel."

Bird continued: "I asked him how he came to make arrangements for the sale of the whiskey and general questions that might bring out his part in the transaction. He told me that he made arrangements to sell it for \$46.50 per case; that he sold this 100 cases here and about 300 cases more; that he collected approximately \$19.50 per case, which he turned over to other parties involved in the transaction and that the ceiling price of \$27.00 per case was to be paid to the distributor, Rollandelli; that he knew it was illegal; he was the secretary of the Bartenders' Union, was connected with the Bartenders' Union, and that he was very much interested in seeing that all of his members were employed and that he was primarily interested in getting liquor for them, although he did tell me on a number of occasions in the presence of Mr. Fineberg that he was to get \$1.75

per case for his commission personally to himself. Well, he refused to tell me the names of the other people to whom he sold approximately 300 cases without permission of his attorney.” (Tr. pp. 31-32.)

ARGUMENT.

I.

THE PROOF OF AN ATTEMPT TO SELL THE LIQUOR CHARGED IN THE INFORMATION PROPERLY SUPPORTED THE VER- DICT OF GUILTY.

The information in this case charged in substance that the defendant “* * * did wilfully and unlawfully sell to one F. W. Larkin, certain distilled spirits * * * at a price of \$46.50 per case, which said price * * * was in excess of and higher than the maximum price established by law, to-wit, \$27.00 per case for each case * * * as the said defendant then and there well knew.”

The Court instructed the jury in part as follows:

“I instruct you that the facts adduced at the trial do not support the charge in the information that defendant made an actual sale of whiskey to said Larkin, because he at no time had title to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an abortive sale or a contract to sell goods which the seller was unable to carry out.

“In all criminal cases the defendant may be found guilty of an offense the commission of

which is necessarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged, if such attempt be itself a separate offense.

* * * * *

“Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him.”

Therefore, whether proof of an attempt to sell supported the verdict is at an issue in this case.

The Statutes of the United States provide directly for this situation:

Title 18 U. S. C. A., Section 565.

“§ 565. *Verdicts; less offense than charged.* In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, if such attempt be itself a separate offense.” (R. S. § 1035.)

The attempt to sell in violation of the maximum price control regulations promulgated under the

Emergency Price Control Act is itself a separate offense. Title 50 U. S. C. A. App., Section 904 (a), provides:

“It shall be unlawful, regardless of any contract agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to pay or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act in violation of any regulation or order under section 2 (section 902 of this appendix), or of any price schedule effective in accordance with the provisions of section 206 (section 926 of this appendix), or of any regulation, order or requirement under section 202(b) or section 205(f) (section 922(b) or 925(f) of this appendix), or to offer, solicit, *attempt*, or agree to do any of the foregoing.” (Italics ours.)

The rule that the proof of an attempt will uphold a conviction under the indictment where the attempt to commit the crime is itself an offense has been recognized in this Circuit. See

Sekinoff v. United States (C.C.A. 9), 283 Fed. 38.

The appellant cites two cases in support of his argument that the lower Court's application of Title 18 U. S. C. A. Section 565, R. S. 1035, requires a reversal of the judgment in this case. The first of these cases is *St. Clair v. United States*, 154 U. S. 134, 14 S. Ct. 1002, 38 L. Ed. 936, in which the defendant had been convicted of murder, instructions to the jury on the lesser

degrees of homicide having been refused. The Court cited Section 1035, and noted at 154 U. S. 154:

“It is, therefore, contended that, as the verdict was, generally ‘guilty’, and did not, in terms indicate of what particular offense the accused was found guilty, the judgment should have been arrested.

“This contention cannot be sustained. We said in *Pointer’s case* that, while the record of a criminal case must state what will affirmatively show the offense, the steps without which the sentence cannot be good, and the sentence itself, all parts of the record must be interpreted together, giving effect to every part if possible, and supplying a deficiency in one part by what appears elsewhere in the record. 151 U. S. 396, 419.”

Thus the judgment was affirmed. The *St. Clair* case in this context stands for only one proposition: That 18 U. S. C. A. Section 565, R. S. 1035, will not be applied to invalidate a judgment where that judgment is clear upon the entire record.

The other case cited by the appellant is *United States v. Martini*, 42 Fed. Supp. 502, at 510, 511. The *Martini* case holds that:

“Section 565 authorizing the verdict of guilty of a lesser offense contemplates that the verdict must be by the finder of fact to which the question of guilt is submitted. This means in this case the jury. Where the jury finds a defendant guilty of one offense it is not within the power of the court after setting aside the verdict to find the defendant guilty of a lesser offense.”

In the case before this Court, the question of the attempt was submitted to the finder of fact, the jury. It was the jury, instructed to consider the question of attempt alone, that decided Small's guilt.

The appellant Small is not prejudiced in this matter with reference to the term imposed; the statutory maximum penalty prescribed for an attempt to sell under 50 *U. S. C. A. App.*, Sections 904(a), 925(b), is the same as that set forth for a violation of an illegal sale itself.

Nor is the appellant Small prejudiced in this matter by the possibility of a later prosecution. Assuming, as the appellant desires, that the judgment on its face is a judgment of conviction on the charge of the unlawful sale, prosecution could not be had for that offense. Neither could the appellant be later prosecuted on the charge of an unlawful attempt to violate the Emergency Price Control Act. In the first place, a reading of the entire record in the matter clearly indicates what took place before the trial Court. Secondly, a judgment on an information or an indictment is a bar to subsequent prosecution for any offense which could have been proved under that information or indictment.

Miller v. United States, 300 Fed. 529, cert. den.

45 S. Ct. 123, 266 U. S. 624, 69 L. Ed. 474;

United States v. Olmstead (C.C.A. 9), 5 Fed.

(2d) 712.

The record in this case thus amply protects the appellant from a second jeopardy.

The situation here at issue is squarely within the plain meaning and forthright language of the statute. Appellant contends that there is a disparity between the proof of an attempt to sell and the verdict of guilty as to the charge of selling itself. Obviously, no such statute as Title 18 U. S. C. A., Section 565 would be necessary where the information itself charges the defendant with an attempt. If the statute is not applicable to the reconciliation of this inconsistency between pleading and proof then it is mere legalistic foppery and legislative superfluity.

II.

THE DEFENDANT WAS ENGAGED IN THE BUSINESS OF BUYING AND SELLING DISTILLED SPIRITS.

The evidence clearly shows that the defendant offered to sell, supply, and to transfer to Larkin 100 cases of whiskey for which the defendant received payment from Larkin. However, the whiskey was not delivered to Larkin and the moneys received by the defendant were returned to Larkin. In addition to this offer is the uncontroverted testimony that the appellant was selling this whiskey for \$46.50 a case and that he was to get \$1.75 a case for his pay—commission—for selling it. The appellant had sold approximately 300 cases to other people. This evidence establishes that the appellant, T. A. Small, was engaged in the business of buying and selling whiskey.

Unfortunately, there is much confusion in the cases interpreting the language, "engaged in the business of" and "doing business". This confusion can be readily ascertained by a reading of the 38 page chapter on Business in Volume 12 of *Corpus Juris Secundum*, commencing at page 761. Most of the cases cited in the article deal with taxation matters and a determination of when a person is engaged in business for tax purposes, a class of cases hardly applicable to the situation which now confronts this Court. However, the definition apparently most quoted in the cases appears to be that of the Supreme Court in the case of *Flint v. Stone Tracy Company*, 220 U. S. 107, 171, wherein the Court said:

"It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict., 158, citing *People v. Commissioner of Taxes*, 23 N. Y. 242, 244. 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, Vol. I, p. 273."

See also:

Daggett v. Burnet, 65 Fed. (2d) 191, 193.

This definition of course does not present a yardstick by which we can accurately measure a person's activities and thereby determine whether or not he is engaged in a particular business. "The decision in

each instance must depend upon the particular facts before the Court.”

Von Baumbach v. Sargent Land Co., 242 U. S. 503, 516.

Did the contract to sell 100 cases to Larkin and the facts surrounding the same, and the admitted sale of (or offer to sell) 300 cases *to other people* occupy the time, attention and labor of Small for the purpose of profit? We submit that it did. He was to receive a profit of \$1.75 per case and he was rendering these services not for pleasure or as an isolated transaction, with no business purpose, but as “mercantile transactions”. (*Webster’s New International Dictionary, Second Edition.*) If the transaction occupied his time for purposes of profit it matters not that his primary occupation was that of a labor representative of the Bartenders’ Union.

Likewise, the fact that no sales may ever have been completed is immaterial since many business ventures end in a loss or are terminated for various reasons before they have hardly started. Here apparently, an injunction (and subsequent arrest of the appellant) terminated the business transactions of the appellant before he could complete the same. If the motive was a profit motive, and time and attention were expended to promote the same, such time and attention make the giver thereof a person engaged in business.

CONCLUSION.

It is respectfully submitted that the evidence is sufficient to sustain the verdict of guilty, that appellant has shown no error and that the judgment should be affirmed.

Dated, San Francisco, California,
December 19, 1945.

Respectfully submitted,

FRANK J. HENNESSY,

United States Attorney,

REYNOLD H. COLVIN,

Assistant United States Attorney,

Attorneys for Appellee.

(Supplement Follows.)

Supplement

Supplement

Maximum Price Regulation 445; 8 F. R. 11161—
pertinent sections:

Section 5.4. *Maximum Prices for Wholesalers.*

“(b) *Initial maximum prices*—(1) *For sales to retailers.* A wholesaler’s initial maximum price per case to retailers shall be his net cost per case (figured according to section 5.3) for his latest base purchase of the item, or if he made no base purchase of the item since March 1942, his net cost per case (figured according to section 5.3) for his most recent purchase of the item from any supplier, except from another wholesaler, multiplied by the percentage mark-up for the item being priced as follows:

- (i) 1.15 for distilled spirits.
- (ii) 1.25 for wine.
- (iii) 1.20 for cordials, liqueurs and specialties.”

Section 5.3. *Determination of “net cost” used in figuring maximum prices for wholesalers, retailers and monopoly states.*

“(b) *Elements of net cost.* The net cost to be used by a wholesaler, retailer or monopoly state to determine a maximum price is the total of the following elements of cost actually paid by him with respect to a particular base purchase of the item to be priced:

“(1) *Purchase price.* The supplier’s selling price (not in excess of his maximum price under

applicable regulations or orders of the Office of Price Administration).

“(i) Excepting any discount for prompt payment (cash discount); but

“(ii) Including any amount subtracted from the supplier's maximum price to compensate for discontinuance of a discount for prompt payment.

“(2) *Freight*. Transportation charges from the supplier's point of shipment to the wholesaler's, retailer's, or monopoly state's customary receiving point for the item, at the rate paid. No amount shall be included for

“(i) Any transportation charges from point of shipment included in the supplier's selling price; or

“(ii) Expense of hauling, drayage or handling within the metropolitan area of the shipping or receiving point: *Provided*, That a monopoly state may include such portion of that expense as it customarily included during March 1942 in determining cost for purposes of mark-up.

“(3) *Taxes and United States customs duties—*

(i) *For wholesalers and retailers*. United States customs duties and United States state and local excise taxes at rates in effect on November 2, 1942, if not included in the supplier's selling price.

“(ii) *For monopoly states*. United States customs duties and United States excise taxes at rates in effect on March 31, 1942, if not included in the supplier's selling price, and any state taxes at rates in effect on March 31, 1942, customarily included during March 1942 in determining cost for applying mark-up.

“Note: License, income, franchise, receipts, sales, use or other similar Federal, state or local taxes cannot be included in the net cost of a wholesaler, retailer or monopoly state.”

Section 7.12. *Definitions.*

“(b) *Definitions of persons to whom this Regulation refers.*

* * * * *

“(3) ‘Wholesaler’ means any person (except a monopoly state or primary distributing agent) engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers.”

No. 10,982

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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FILED

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PAUL P. O'BRIEN,
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No. 10,982

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

T. A. SMALL,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

*To the Honorable United States Circuit Court of
Appeals for the Ninth Circuit:*

The appellant T. A. Small respectfully petitions for a rehearing in the above entitled cause upon the following grounds:

1. The court inadvertently misconceived the contentions made by the appellant.
2. The court erred in holding that the evidence supported a conviction of sale in violation of the Emergency Price Control Act of 1942.

1. THE COURT INADVERTENTLY MISCONCEIVED THE
CONTENTIONS MADE BY THE APPELLANT.

The opinion states:

“The only question meriting our consideration was appellant’s contention that he was found guilty of and sentenced to imprisonment for a crime not charged in the information.”

Nowhere in his brief did appellant make a contention of such character. His contention was exactly the opposite. He contended that although the information charging sale would authorize a conviction of attempted sale, evidence merely establishing attempted sale would not authorize a conviction of sale. He relied upon the instructions of the court telling the jury that “the facts adduced at the trial do not support the charge in the information that defendant made an actual sale”; that “the evidence does not support a charge that there was a sale”; and that the jury might therefore find “that the defendant here was guilty of an attempt to sell”. (Bf. App. 5-6.) He challenged the action of the trial court in refusing to direct a verdict in his favor on the charge of sale, and leaving the case in such shape that the jury nevertheless found him guilty of sale. (Bf. App. 8-12.) He invoked the Supreme Court case of *St. Clair v. United States*, 154 U.S. 134, 14 S.Ct. 1002, 1010, 38 L.Ed. 936, as decisive authority to the effect that his conviction and sentence were on the charge of sale and not attempted sale. (Bf. App. 10-11.) And he contended that the judgment should be reversed because the evidence and the law did not support a conviction and

sentence for sale, but at most supported a conviction and sentence for the lesser offense of attempted sale. (Bf. App. 8-12.)

It is therefore obvious that the court inadvertently misconceived the contentions of the appellant, and that a rehearing should accordingly be granted.

2. THE COURT ERRED IN HOLDING THAT THE EVIDENCE SUPPORTED A CONVICTION OF SALE IN VIOLATION OF THE EMERGENCY PRICE CONTROL ACT OF 1942.

The opinion states:

“The appellant did acts here toward the commission of the crime charged in the information. The appellant more than attempted to make a sale, he actually completed all the acts to consummate the sale. The testimony, which is uncontradicted, shows that he accepted the down payment and in effect issued a delivery order in that he directed the purchaser to go to the Rollandelli Warehouse and present the balance of the purchase price and pick up the whiskey. No other act of the appellant was required to complete the sale. The sale was made but the goods were not delivered because the law intervened to prevent it. The lower court was more correct in describing the sale as an abortive sale. We believe the evidence would support a conviction on the information as charged.”

Appellant respectfully points out, moreover, that the settled law of sales is opposed to the conclusion of

this court that the evidence supported a finding that a sale was made.

In *Hawaiian Gas Products Co. v. Commissioner Int. Rev.*, 126 F. 2d 4, this court said at page 5:

“‘A sale’, said the Supreme Court in the Five Per Cent Cases (*State of Iowa v. McFarland*), 110 U. S. 471, 478, 4 S. Ct. 210, 214, 28 L. Ed. 198, ‘in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent’.”

To the same effect are the decisions of this court in *Rogers v. Commissioner Int. Rev.*, 103 F. 2d 790, 792, and *Perata v. Commissioner Int. Rev.*, 89 F. 2d 550, 552. In the case last cited (89 F. 2d 550), it was said, at page 552:

“The distinction between a contract of sale and a sale is shown in 55 C. J. 39, sec. 5: ‘A contract to sell goods, as distinguished from a sale, is a contract whereby the seller agrees to transfer the property in goods to the buyer for a price which the buyer pays or agrees to pay, as where there is no price paid for the goods and no delivery of them. * * * A contract to sell is merely a promise of an executory nature, and until it is executed gives merely a right of action for its breach, or specific performance, and does not pass the property in goods or chattels, whereas a sale is in the nature of a conveyance or transfer of title’.”

The applicable law on the subject is summed up in *Fox v. United States*, 4 Cir., 34 F. 2d 99, where a con-

viction for sale in violation of the National Prohibition Act was reversed. At pages 99 and 100 the court said:

(99) "In the second place, there was no delivery of liquor by the defendant or by any one acting in his behalf. The statute (27 USCA, sec. 12) provides that, 'no person shall manufacture, *sell*, barter, transport, import, export, (100) deliver, furnish or possess any intoxicating liquor,' etc., and the violation of the statute with which defendant is charged is selling. An executory contract to sell might, in a proper case, constitute a conspiracy to violate the act * * *; but there could not be a sale in violation thereof unless the sale were completed by delivery, either actual or constructive, which is not present in this case. 'The offense of illegally selling liquor is not committed by a bargain or executory contract for a sale. There must be a completed sale, which passes the property, consummated by the act of the parties as distinguished from the operation of law, and amounting to a vending and purchasing of the particular commodity.' (33 C. J. 591; *Filatreau v. United States*, 14 F. 2d 659; * * *.)

It is elementary that a sale involves a transfer of title, and that there can be no sale until a specific chattel has been ascertained and identified. Here there was no transfer of title to any intoxicating liquor and no liquor was ascertained or identified as the subject of sale. The most that can be said, even if the transaction between defendant and Allen be construed as a bona fide agreement on the part of defendant to deliver

liquor to Allen, is that there was a mere executory contract to sell. This is not a sale. The distinction is pointed out in *Mechem on Sales*, par. 5, quoting *Chalmers on Sales*, as follows:

‘“By an agreement to sell,” it has been said’ a *jus in personam* is created; by a sale a *jus in rem* is transferred. If an agreement to sell be broken, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes. * * * But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against him, but also the usual proprietary remedies against the goods themselves, such as an action for conversion and detinue.” ’

The distinction is well stated by Prof. Williston in the second edition of *Williston on Sales*, par. 2, as follows:

‘Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is transferred. If it is transferred, there is a sale, an executed sale, even though the price be not paid. Conversely, though the price be paid, there is but a contract to sell (not very happily called an executory sale), if the property in the goods has not passed. * * *

In *Filiatreau v. United States*, 14 F. 2d 659, the Circuit Court of Appeals of the Sixth Circuit held that there was no sale within the prohibition of the statute where there was no delivery even though the contract had been agreed and the whiskey had been sent for and was ready to be delivered.”

An application of the foregoing principles in the law of sales to the evidence in the present case, will readily convince this court, just as the trial court was convinced, that at best the evidence merely established a contract to sell. As disclosed by the evidence for the government (Bf. App. 2-5) there was no "transfer of property", for defendant had no whiskey to transfer and no whiskey was delivered either actually or constructively. He had no title to any whiskey in the Rollandelli Warehouse. He had no control over any whiskey in the Rollandelli Warehouse. No specific whiskey was ever ascertained or identified as the subject of sale. This court therefore erred in holding that the evidence supported a conviction of sale.

Wherefore, it is respectfully submitted that a rehearing should be granted in the above entitled cause.

Dated, San Francisco, California,
February 20, 1946.

FRED McDONALD,

*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL.

The undersigned, counsel for appellant in the above entitled cause, hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded, in both law and fact, and that it is not interposed for delay.

Dated, San Francisco, California,
February 20, 1946.

FRED McDONALD,
*Attorney for Appellant
and Petitioner.*

No. 10987

United States
Circuit Court of Appeals
For the Ninth Circuit.

RONALD ST. CLAIR BAIN, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

FILED

MAY 24 1945

PAUL P. O'BRIEN,
CLERK

No. 10987

United States
Circuit Court of Appeals
For the Ninth Circuit.

RONALD ST. CLAIR BAIN, JR.,
Appellant,
vs.
UNITED STATES OF AMERICA,
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Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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COUNSEL OF RECORD

J. CHARLES DENNIS, Esq.,

United States Attorney

HARRY SAGER,

Assistant United States Attorney,

324 Federal Building,

Seattle, Washington

Attorneys for Plaintiff-Appellee

DELLMORE LESSARD, Esq.,

Corbett Building,

Portland, Oregon

Attorney for Defendant-Appellant.

United States District Court Western District of
Washington, Southern Division
July Term, 1944

No. 15675

UNITED STATES OF AMERICA,
Plaintiff,
vs.

RONALD ST. CLAIR BAIN, Jr.,
Defendant.

INDICTMENT

Violation: Selective Training and Service
Act of 1940

United States of America
Western District of Washington,
Southern Division—ss.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Southern Division of the Western District of Washington, upon their oaths present: [*1]

COUNT I

That Ronald St. Clair Bain, Jr., whose true and full name other than as given is to these grand jurors unknown, on or about the 5th day of September, 1944, at Kelso, in Cowlitz County, Washington, then and there being, did then and there knowingly, fail, neglect and refuse to perform a

*Page numbering appearing at foot of page of original certified Transcript of Record.

duty required of him under the Selective Training and Service Act of 1940, and the Rules and Regulations thereunder, in that the said Ronald St. Clair Bain, Jr., did fail, neglect and refuse to report for work of national importance under civilian direction, after having been directed and ordered so to do by Cowlitz County Local Board Number One, Kelso, Washington, the said Local Board then and there having authority to make such order and direction, and the said defendant then and there being a selected man as defined by the Rules and Regulations under said Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

S/ J. CHARLES DENNIS

United States of America

S/ HARRY SAGER

Assistant United States

Attorney [2]

Presented to the Court by Foreman of the Grand Jury in open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court November 21, 1944.

By S/ GLADYS CHITTY

Deputy Clerk [3]

[Title of District Court and Cause.]

CASH BAIL RECOGNIZANCE

Be It Remembered That on this 14th day of November, 1944, before me the United States Com-

missioner for the Western District of Washington, personally came Ronald St. Clair Bain, as principal, and Ben H. Wright, as surety, and having deposited bail herein in the sum of One Thousand (\$1,000.00) Dollars cash, now acknowledge themselves to be indebted to the United States of America in the sum of \$1,000.00, if default be made in the conditions following, to-wit:

The condition of this recognizance is such that if the said Ronald St. Clair Bain shall personally appear before the United States District Court for the Western District of Washington, Southern Division at Tacoma, Washington, on the 20th day of November, 1944 at 10:00 o'clock A.M. and from day to day and time to time and term to term thereafter, then and there to answer the charges contained in an information filed before L. M. Burnett, United States Commissioner for the Western District of Washington charging the said Ronald St. Clair Bain with a violation of Selective Training & Service Act of 1940, as amended, and the rules and regulation promulgated pursuant thereto, and then and there abide the order of the said Court and not depart from said district without leave of said Court, then this recognizance to be void, otherwise to remain in full force and virtue.

S/ RONALD S. CLAIR BAIN

S/ BEN H. WRIGHT [4]

United States of America,
Western District of Washington,
Southern Division—ss.

I, L. M. Burnett, United States Commissioner for the Western District of Washington, Southern Division, do hereby certify that on this 14th day of November, 1944, personally appeared Ronald St. Clair Bain, as principal, and Ben H. Wright, as surety, in the foregoing bond, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] S/ L. M. BURNETT
United States Commissioner, Western District of
Washington.

Copy endorsed: Filed, Nov. 14, 1944.

L. M. BURNETT,
U. S. Commissioner
No. 328

[Endorsed]: Filed Nov. 17, 1944. [5]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 25th day of November, 1944, the Honorable Charles H. Leavy, U. S. District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

No. 15675

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD ST. CLAIR BAIN, Jr.,

Defendant.

ARRAIGNMENT AND PLEA

Now on this 25th day of November, 1944, this cause comes on before the court for arraignment and plea. Harry Sager, Asst. U. S. Attorney represents the government. Defendant in court, but his counsel is not present. Mr. Sager advises the court that defendant's counsel Delmore Lessard, from Portland, Oregon, will not be present, but that the defendant has been advised to proceed with the arraignment and that counsel will be present for the trial. Defendant states his true name is Ronald St. Clair Bain, Jr., and states that he will proceed with the arraignment. Defendant arraigned. Mr. Sager reads the Indictment. Defend-

ant now enters a plea of Not Guilty and cause is set for trial on Monday, December 4. [6]

[Title of District Court and Cause.]

VERDICT

We, the jury empanelled in the above-entitled cause, find the defendant, Ronald St. Clair Bain, Jr., is Guilty as charged in Count I of the Indictment herein.

Dated this 4th day of December, 1944.

S/ ALBERT JOHNSON

Foreman

[Endorsed]: Filed Dec. 4, 1944. [7]

United States District Court, Western District of
Washington, Southern Division
July Term, 1944

No. 15675

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD ST. CLAIR BAINE, Jr.,

Defendant.

JUDGMENT AND SENTENCE

Comes now on this 4th day of December, 1944, said defendant, Ronald St. Clair Bain, Jr., into

open court with his attorney, Delmor Lessard, for sentence, after having been found guilty of the offense charged in Count I of the Indictment herein by verdict of a jury duly and regularly empabled to hear the said cause, and being informed by the court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he having made a statement in his own behalf,

Wherefore, by reason of the law and the premises, it is

Ordered and Adjudged by the Court that the said defendant, upon the verdict of the jury, is guilty as charged in the one count of the Indictment herein, and that he be committed to the custody of the Attorney General of the United States of America for imprisonment in such penal institution as the Attorney General of the United States, or his authorized representative may by law designate for the period of Eighteen (18) Months. [8]

And the said defendant is hereby remanded into the custody of the United States Marshal for this District for delivery to the Warden, Superintendent or other person in charge of such institution as the Attorney General of the United States may by law designate, for the purpose of executing said sentence. This judgment and sentence for all purposes shall take the place of commitment, and be recognized by the Warden or Keeper of any Federal Penal Institution as such.

Done in Open Court this 4th day of December,
1944.

CHARLES H. LEAVY

United States District Judge

Presented by:

HARRY SAGER

Asst. United States Attorney

Violation of Selective Training & Service Act
of 1940. (Refusal to respond to Induction order.)

[Endorsed]: Filed Dec. 4, 1944. [9]

RECORD OF PROCEEDINGS

At a regular session of the United States District
Court for the Western District of Washington, held
at Tacoma, in the Southern Division thereof on the
4th day of December, 1944, the Honorable Charles
H. Leavy, U. S. District Judge presiding, among
other proceedings had were the following, truly and
correctly copied from the Journal record of said
court:

No. 15675

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD ST. CLAIR HAIN, Jr.,

Defendant.

TRIAL

Now on this 4th day of December, 1944, this
cause comes on for trial to the court with a jury.

* * * * *

Upon oral motion of Mr. Delmore Lessard, counsel for Defendant, the court orders that defendant may continue at large on present cash bond of \$1000.00 until December 15, 1944, pending notice of appeal. [10]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the defendant through and by his attorney, Dellmore Lessard, and respectfully moves the court for an order granting the defendant a New Trial on account of error committed by the Honorable Trial Court at and during the trial herein in which the Court erroneously

(1) Refused to permit the defendant, after offer made, to present evidence to the jury of his qualifications as a Minister of the Gospel;

(2) Refused to direct the jury to acquit the defendant;

(3) Refused defendant's requested instruction to the jury;

(4) Withdrew from the consideration of the jury the question of alleged error on the part of the Local Draft Board in refusing to grant the classification of IV-d and exempt defendant from training and service under the Selective Service and Training Act.

Dated this 4th day of December, 1944.

S/ DELLMORE LESSARD

Attorney for Defendant.

Presented by

DELLMORE LESSARD

Attorney for Defendant.

Copy received this 8th day of December, 1944.

S/ HARRY SAGER

Asst. U. S. Attorney.

[Endorsed]: Filed Dec. 8, 1944. [11]

[Title of District Court and Cause.]

ORDER OVER-RULING MOTION FOR
NEW TRIAL

This matter coming on regularly for hearing upon motion of Dellmore Lessard, attorney for the defendant, for a New Trial of the above entitled cause, and the Government being represented by Harry Sager, Assistant United States Attorney, and the defendant being present in person and by his attorney; the Court having heard and considered arguments by respective counsel and good cause appearing

It Is Ordered that the Motion for a New Trial by the defendant herein be and the same is hereby Over-ruled.

Dated at Tacoma, Washington this 8th day of December, 1944.

CHARLES H. LEAVY

Judge

Presented by

DELLMORE LESSARD

Attorney for Defendant.

[Endorsed]: Filed Dec. 8, 1944. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and Address of Appellant: Ronald St. Clair Bain, Jr., Route 3, Box 502A, Kelso, Washington.

Name and Address of Appellant's Attorney: Dellmore Lessard, 505 Corbett Bldg., Portland, Oregon.

Offense: Violation of Training and Service Act of 1940 (Refusal to respond to Induction Order).

Date of Judgment: December 4th, 1944.

Brief Description of Judgment or Sentence: Eighteen (18) months in Federal Penitentiary.

I, the above-named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned on the grounds set forth below.

S/ RONALD ST. CLAIR BAIN, Jr.

Appellant

GROUND OF APPEAL

1. Errors committed by the Trial Court in (a) Refusing to permit the defendant, after offer made, to present evidence to the jury of his qualifications as a Minister of the Gospel; (b) Refusal to direct the jury to acquit this defendant; (c) Refusal to give defendant's requested instruction to the jury; (d) Withdrawing from the consideration of the jury the question of alleged error on the part of the local Draft Board in refusing to grant [13] the classification of IV-d and exempt the defendant from training and service under the Selective Service and Training Act; (e) Refusal to grant defendant's motion for a New Trial.

2. Error in imposing any sentence on this defendant.

3. Error in finding this defendant guilty.

[Endorsed]: Filed Dec. 8, 1944. [14]

[Title of District Court and Cause.]

SUPERSEDEAS—ORDER

This cause coming on to be heard this 8th day of December, 1944, upon the application of the defendant, Ronald St. Clair Bain, Jr., for an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, and said appeal having been allowed;

It Is Ordered that the same shall operate as a supersedeas, the said appellant having heretofore

given a bond in the sum of One Thousand (\$1,000.00) Dollars cash as provided by law, and the Clerk of this Court is hereby directed to stay the mandate of the District Court of the United States for the Western District of Washington, Southern Division until the further order of this court.

Dated this 8th day of December, 1944.

CHARLES H. LEAVY

Judge.

Presented by

DELLMORE LESSARD

Attorney for Defendant.

[Endorsed]: Filed Dec. 8, 1944. [15]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter coming on regularly for hearing upon motion of Dellmore Lessard, attorney for the defendant, and good cause appearing;

It Is Ordered that the time for filing of the assignment of errors, and the time for settling and filing of the Bill of Exceptions herein, and also the time of filing of the transcript of the proceedings herein with the Clerk of the United States Circuit Court of Appeals, and all other matters in connection with this appeal, be and it is hereby extended to and including the 4th day of February, 1945.

Dated at Tacoma, Washington this 28 day of December, 1944.

CHARLES H. LEAVY

Presented by

DELLMORE LESSARD

Attorney for Defendant.

Received a copy of above order this 28 day of December, 1944.

HARRY SAGER

Asst. U. S. District Atty.

[Endorsed]: Filed Dec. 28, 1944. [16]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant hereby adopts as his points on appeal the assignments of error heretofore placed on file herein.

Dated at Portland, Oregon this 24 day of January, 1945.

S/ DELLMORE LESSARD

Attorney for Defendant and Appellant.

[Endorsed]: Filed Jan. 25, 1945. [17]

[Title of District Court and Cause.]

PRAECIPE TO CLERK

The defendant requests that you prepare a transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore taken herein, and include in said transcript the following pleadings, proceedings, orders and documents, towit:

1. Indictment
2. Record of plea of not guilty
3. All exhibits, including those of defendant not admitted.
4. Verdict of jury
5. Judgment of Court and sentence
6. Motion for new trial
7. Order denying motion for new trial
8. Notice of appeal
9. Bail bond of defendant
10. Supersedeas—Order
11. Order releasing defendant on bail pending appeal
12. Assignment of Errors
13. Bill of Exceptions
14. All orders extending time
15. Statement of points upon which appellant intends to rely
16. This praecipe

Dated at Portland, Oregon this 24 day of January, 1945.

S/ DELLMORE LESSARD

Attorney for Defendant and
Appellant.

Received a copy of above this 25th day of January, 1945.

S/ J. CHARLES DENNIS

U. S. District Attorney

[Endorsed]: Filed Jan. 25, 1945. [18]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
State of Oregon,
County of Multnomah—ss.

I, Dellmore Lessard, being first duly sworn, depose and say: That I am the attorney of record for the above named defendant. That the above entitled cause was tried and the defendant sentenced by the court on December 4, 1944. That thereafter the defendant filed his notice of appeal to the Circuit Court of Appeals for the Ninth Circuit. That on December 9, 1944 I ordered a transcript of the record of said trial from Russell N. Anderson, the court reporter, and today received a notice from him that the transcript is now ready and will be sent to me upon payment of the cost of the same. That I have this day mailed my check in the sum

of \$47.70 to said reporter, but probably will not receive the said transcript until after January 1, 1945. That it is necessary that I have a reasonable time in which to study said transcript in order to properly prepare the Assignment of Errors and Bill of Exceptions in this appeal. That a reasonable time, which I ask the court to allow, will be to and including February 4, 1945.

DELLMORE LESSARD

Sworn to and subscribed before me this 27th day of December, 1944.

WINIFRED R. SUINN

Notary Public for Oregon.

My Com. Exp. 2/28/47

Received a copy of above this ... day of December, 1944.

.....

Asst. U. S. District Atty.

[Endorsed]: Filed Dec. 28, 1944. [19]

At a Stated Term, to-wit: The October Term 1944 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Thursday, the fifteenth day of February in the year of our Lord one thousand nine hundred and forty-five.

Present:

Honorable Curtis D. Wilbur, Senior Circuit
Judge, Presiding,

Honorable Francis A. Garrecht, Circuit Judge,

Honorable William Healy, Circuit Judge.

No. 10987

RONALD ST. CLAIR BAIN, Jr.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER EXTENDING TIME TO SETTLE AND
FILE BILL OF EXCEPTIONS

Upon consideration of the application of Mr. Dellmore Lessard, counsel for appellant, and of the affidavit in support thereof, and by direction of the Court,

It Is Ordered that the time within which the bill of exceptions may be settled and filed be, and hereby is extended to and including March 15, 1945.

I hereby certify that the foregoing is a full, true and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 15th day of February, 1945.

(Signed) PAUL P. O'BRIEN

Clerk, U. S. Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Filed Feb. 20, 1945. [20]

[Title of District Court and Cause.]

**ORDER FOR TRANSMISSION OF ORIGINAL
EXHIBITS**

On motion of Dellmore Lessard, attorney for the defendant in the above entitled case, and for good cause shown,

It Is Ordered That all of the exhibits introduced by both parties, and all exhibits produced and marked for identification on the part of the defendant, but not admitted in evidence, be transmitted by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit in their original form.

Dated this 5th day of Mar., 1945.

CHARLES H. LEAVY

Judge.

Presented by

DELLMORE LESSARD

Attorney for Defendant.

[Endorsed]: Filed Mar. 5, 1945. [21]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 21, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause 15675, United States of America, Plaintiff, vs. Ronald St. Clair Bain, Jr., Defendant, as required by Praeceptum of Defendant-Appellant, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of the United States District Court for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original Bill of Exceptions, as certified by the Judge of the said District Court, consisting of pages numbered 1 to 6, inclusive, and the original Assignment of Errors

herein, consisting of one page, are transmitted herewith.

I do further certify that pursuant to Order of the District Court the original exhibits, marked for identification, and/or admitted in evidence, being Plaintiff's Exhibits numbered 1 to 18, inclusive, and Defendant's Exhibits, numbered A-1 to A-11, inclusive, are transmitted herewith. [22]

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred by me on behalf of the Defendant-Appellant herein in the preparation and certification of the said Transcript of the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Appeal fee\$5.00

To Clerk's fee for preparing and
certifying Transcript of Record..... 3.75

\$8.75

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, in the Western District of Washington, this 14th day of March, 1945.

[Seal]

MILLARD P. THOMAS,

Clerk

By E. E. REDMAYNE

Deputy [23]

United States District Court, Western District of
Washington, Southern Division
July Term, 1944

No. 15675

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD ST. CLAIR BAIN, Jr.,

Defendant.

ASSIGNMENT OF ERRORS

Comes now the defendant and appellant, Ronald St. Clair Bain, Jr., and files the following Assignment of Errors upon which he is relying on appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

I.

That the Court erred in that the Court withdrew from the consideration of the jury during the trial all consideration of whether or not the Local Selective Service Board or the Appeal Board committed error in refusing to grant defendant exemption from training and service under the Selective Service Act as a minister of the Gospel, and excluded all evidence pertaining thereto.

II.

That the Court erred in refusing to give defendant's requested instruction to the jury.

III.

That the Court erred in denying defendant's motion for a directed verdict of "Not Guilty."

IV.

That the Court erred in denying defendant's motion for a judgment of acquittal notwithstanding the verdict, or in the alternative for a new trial.

V.

That the Court erred in finding and adjudging the defendant guilty.

DELLMORE LESSARD

Attorney for defendant

A true copy received Jan. 25, 1945.

J. CHARLES DENNIS

U. S. Attorney

[Endorsed]: Filed Jan. 25, 1945.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered That the above entitled case came on regularly for trial on the 4th day of December, 1944 in the above entitled Court at Tacoma, Washington, before the Honorable Charles H. Leavy, Judge Presiding. A jury having been duly empaneled and sworn as by law provided. The United States of America appeared by Mr. Harry

Sager, Assistant United States District Attorney. Defendant appeared in person and by his attorney, Mr. Dellmore Lessard.

The appealing defendant respectfully submits the following Bill of Exceptions:

EXCEPTION No. 1

That after the government had rested, and during the trial of this cause the defendant made an offer of proof of the following facts: (page 45 transcript)

“Mr. Lessard: Well, if the Court please, I desire the defendant to prove that he is a minister of the gospel, devoting his whole time to the work as a minister, with the exception of such time as necessary to earn a living to support himself and wife, and he is one of Jehovah’s Witnesses, and that he has had that belief for a number of years, and based upon that belief, he refused to report at the conscientious objector’s camp, because to do so would be in conflict with his religious belief. . . .

“Further, that the action of the board in classifying him in 4-D was capricious, arbitrary and that the board did not give him his exemption to which he is lawfully entitled as a minister of the gospel.

“The Court: Your offer of proof will be denied, and exception allowed. . . .

(page 42 transcript)

“The Court . . . I shall have to deny your application, your motion to—your challenge to the sufficiency of the evidence and your motion to dismiss, and likewise deny your application to make proof

on the issue of good faith of the draft board and the appeal board, and on the issue of whether or not they were arbitrary, capricious and acting without any facts to support their conclusion, and allow you an exception. . . .

(page 43 transcript)

“The Court: I am not prepared to say that. I am willing to let that responsibility rest upon the shoulders of the Ninth Circuit, rather than upon my decision. I shall hold, and do hold, as I stated before that the Falbo case is controlling in the set of facts here, and that therefore evidence of any arbitrary, capricious action in a criminal prosecution is not admissible.”

EXCEPTION No. 2

The plaintiff and defendant having concluded and submitted their evidence, the defendant thereupon requested the judge to give an instruction substantially as follows:

“The Court hereby instructs you that if you find that the local selective service board erroneously classified defendant in Class IV-E, or that the defendant was entitled to a classification of IV-D as a minister of the Gospel, the order of said board would then be void and of no effect and defendant would not be required to obey said order, and your verdict should therefore be, if you so find, not guilty.”

But the Court refused to give such charge, and to which refusal the defendant excepted.

EXCEPTION No. 3

That after both parties had rested the defendant moved the court for a directed verdict of "Not Guilty," but that the Court denied said motion, and allowed an exception.

EXCEPTION No. 4

The Court thereupon gave the following instructions to the jury:

"The material allegations of the indictment and the essential elements of the offense which the Government must prove beyond a reasonable doubt are:

"1. That the defendant was registered under the Selective Service Training & Service Act.

"2. That he had been classified as a person assigned to work of national importance.

"3. That on or about September 5, 1944, he was directed and ordered to report for work of national importance under civilian direction, by his draft board; and

"4. That he knowingly failed, neglected, or refused to report for such work when so ordered.

"If you find from the evidence in this case beyond a reasonable doubt that the defendant, after being registered under the Selective Training & Service Act, and being classified by Local Draft Board No. 1, Shoshone County, Idaho, as a conscientious objector, and thereafter was transferred to Cowlitz County Board No. 1 at Kelso, Washington, for induction, and that he was notified and ordered to report for work of national importance under civilian direction by that draft board, and

that he knowingly failed, neglected or refused to so report when so ordered, then you would find him guilty as charged in the indictment herein.

“If you fail to find each of these essential facts as I have here enumerated them to you, it would be your duty to acquit the defendant.

“You are instructed that the Selective Training & Service Act of 1940 is constitutional, and if you find from the evidence beyond a reasonable doubt that the defendant violated the Act in the manner charged in the indictment, and as I have indicated to you in this charge, you should bring in a verdict of guilty. On the other hand, as I have already stated to you, if the Government has failed to prove the charges contained in the indictment, by evidence beyond a reasonable doubt, then you will acquit the defendant.

“You are instructed that persons obliged to register under the Selective Training & Service Act of 1940 are not entitled to any particular classification, nor to exemption or deferment as a matter of right. Discretion to determine the proper classification of a registrant, or whether a registrant is entitled to exemption or deferment, is reposed by the Act in the President of the United States, and the local draft board, or other agencies which have been set up under the Act for the purpose of administering it. In accordance with the provisions of the Act and the rules and regulations thereunder, the local draft boards are given the power and the authority, and it is their duty to classify their

registrants. Whether or not a registrant is entitled to be classified as a conscientious objector or as a minister of religion, presents a question of fact, which, from its very nature, is committed to the determination of the local draft board, and when a draft board has determined the classification of a registrant, its findings in that respect are final, unless reversed by appeal, provided by the law and the regulations.”

“So, if you find in this case that Local Board No. 1, of Shoshone County, Idaho, considered the claim of the defendant to be classified as a Minister of Religion, and thereafter denied him that classification and the deferment he requested, but classified him as a conscientious objector, such action and such a classification of the board is binding upon this court, and upon you as jurors, and neither you, as jurors, nor I, as judge, have any right to question it.”

To the giving of said charge the defendant excepted and exception was granted by the Court.

EXCEPTION No. 5

The said cause having been submitted to the jury by the Court under its charges, and the jury having rendered a verdict against the defendant, on December 4th, 1944, at the term of Court aforesaid, the defendant made and submitted to the said Court his motion for a judgment notwithstanding the verdict of the jury, and in the alternative for a new trial, on the ground of error committed by the trial judge at the time of trial in that the trial judge

refused to give the charge submitted by the defendant, and in that the trial judge in his charge to the jury withdraw from their consideration the question of whether or not the local selective service board which had jurisdiction of the defendant had been guilty of arbitrary, capricious or unlawful conduct in refusing to give defendant the classification of IV-D and thereby exempt him from training and service, or in giving him the classification of IV-E without proper ground therefor.

On December 4th, 1944, the said motion came on to be heard, and upon consideration of said motion the court on the same day denied the same, to which ruling the defendant excepted.

In connection herewith there is hereto attached a full transcript of the testimony introduced at the trial, and all exhibits introduced by the government and all exhibits offered by the defendant, and made a part of this Bill of Exceptions.

DELLMORE LESSARD

Attorney for defendant and
appellant.

United States of America,
State of Washington,
County of Pierce—ss.

It Is Hereby Certified that on the 28th day of December, 1944, the Honorable Charles H. Leavy, Judge of the above entitled Court, for good cause shown entered an Order allowing defendant, Ronald St. Clair Bain, Jr., to have to and including the 4th day of February, 1945 for settlement and filing of

Bill of Exceptions and Assignment of Errors, in respect to the within appeal.

It further appearing that there is attached hereto a full transcript of the testimony offered in the above entitled case and all exhibits introduced by the government and exhibits offered by the defendant, the Exceptions is by me allowed and signed this 5th day of March, 1945.

CHARLES H. LEAVY

Judge of the District Court of the United States
for the Western District of Washington, Southern Division.

State of Washington,
County of Pierce—ss.

Due service of the within Bill of Exceptions is hereby accepted in Pierce County, Washington, this 25 day of January, 1945, by receiving a copy thereof, duly certified to as such by Dellmore Lessard, attorney for defendant and appellant.

J. CHARLES DENNIS

U. S. District Attorney

Presented by

DELLMORE LESSARD

Attorney for defendant and
appellant.

[Endorsed]: Filed Mar. 5, 1945.

[Endorsed]: No. 10987. United States Circuit Court of Appeals for the Ninth Circuit. Ronald St. Clair Bain, Jr., Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 20, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10987

RONALD ST. CLAIR BAIN, Jr.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON APPEAL

Appellant hereby adopts the Statement of Points appearing in the transcript of the record herein, and which are the same as his Assignments of Error, as the points upon which he intends to rely on appeal.

Dated at Portland, Oregon this 28th day of March, 1945.

DELLMORE LESSARD

Attorney for appellant.

DESIGNATION OF RECORD FOR PRINTING

Appellant hereby designates the entire certified transcript for printing, save and except the exhibits introduced by the government, and those offered by the appellant but not admitted, and requests that said exhibits be considered by the court in their original form.

Dated at Portland, Oregon this 28th day of March, 1945.

DELLMORE LESSARD

Attorney for appellant.

[Endorsed]: Filed March 30, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION THAT EXHIBITS MAY BE
CONSIDERED IN ORIGINAL FORM

Whereas, the exhibits introduced by appellee at the trial of the above entitled cause and the exhibits of the defendant offered, but not admitted in evidence are of great length and the expense of printing the same would be great;

It Is Therefore Stipulated that, subject to the approval of the Court, the said exhibits need not be printed as part of the transcript of the record, but may be considered by the Court in their original form.

Dated this 28th day of March, 1945.

DELLMORE LESSARD

Attorney for appellant

HARRY SAGER

Attorney for appellee

So Ordered

CURTIS D. WILBUR

Senior United States Circuit
Judge

[Endorsed]: Filed April 2, 1945. Paul P. O'Brien, Clerk.

No. 10988

United States
Circuit Court of Appeals
For the Ninth Circuit.

DETWEILER BROS., INC., a Corporation,
Appellant,

VS.

L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Southern Division

FILED

APR 3 - 1945

PAUL P. O'BRIEN,
CLERK

No. 10988

United States
Circuit Court of Appeals

For the Ninth Circuit.

DETWEILER BROS., INC., a Corporation,
Appellant,

vs.

L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
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Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD

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J. P. THOMAN

Twin Falls, Idaho

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U. S. Department of Labor,
208 U. S. Court House, Old,
Portland, 4, Oregon,

or

c/o Wage and Hour Division,
U. S. Department of Labor,
402 Federal Building,
Boise, Idaho

Attorneys for Appellee. [2*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court
for the District of Idaho,
Southern Division

No. 2301

L. METCALF WALLING, ADMINISTRATOR
of the WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF LA-
BOR

Petitioner,

vs.

DETWEILER BROS., INC., a corporation,
Respondent.

APPLICATION TO COMPEL RESPONDENT
TO ATTEND, TESTIFY AND PRODUCE
DOCUMENTARY EVIDENCE.

L. Metcalfe Walling, Administrator, Wage and Hour Division, United States Department of Labor, pursuant to the Fair Labor Standards Act of 1938 (c.-676, 52 Stat. 1060, 29 U.S.C., sec. 201), herein-after referred to as the Act, respectfully applies to this Honorable Court for an order directing Detweiler Bros., Inc., the respondent herein, to appear before him or such representatives as he may designate and to produce documentary evidence and to give testimony, as required by a subpoena duces tecum issued to it, as set forth herein, and as reasons therefor shows the Court:

I.

The petitioner, L. Metcalfe Walling, hereinafter referred to as the Administrator, is the Administrator of the Wage and Hour Division, United States Department of Labor. The Administrator, or his designated representatives, are empowered by virtue of Section 11(a) of the Act to investigate, enter and inspect places and records (and make such transcriptions thereof) as he may deem necessary or appropriate to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act. By virtue of Section 9 of the Act, the provisions of Sections 9 and 10 of the Federal Trade Commission Act of September 26, 1914, as [3] amended, U. S. C. Title 15, Secs. 49 and 50 (relating to the attendance of witnesses and the production of books, papers and documents), are made applicable to the jurisdiction, powers and duties of the Administrator, and the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation.

II.

Jurisdiction to issue the order herein prayed for is conferred upon this Court by virtue of Section 9 of the Federal Trade Commission Act (made applicable by Section 9 of the Act, as stated above), which empowers any of the district courts of the United States within the jurisdiction of which an investigation is carried on, in case of refusal to

obey a subpoena to any corporation, or other person, to issue an order requiring such corporation, or other person, to appear or produce documentary evidence. The investigation, in the course of which the subpoena duces tecum was issued by the Administrator and served upon the respondent, is being carried on in the Southern Division of the District of Idaho, within the jurisdiction of this Court.

III.

At all times hereinafter referred to, respondent was and is a corporation organized and existing under and by virtue of the laws of the State of Idaho, having its principal office and place of business at 144 Second Avenue, North, Twin Falls, Idaho, within the jurisdiction of this Court.

IV.

Upon information and belief: C. H. Detweiler, at all times herein mentioned, was and is an officer of respondent, to wit: its president.

V.

Upon information and belief: Respondent is engaged in the business of purchasing, manufacturing, producing, sell- [4] ing, installing, and shipping plumbing, sheet metal, and heating supplies, and in connection with such purchase, manufacture, production, sale, installation, and shipment, is engaged in the production of goods for interstate commerce, and is engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

VI.

Since October, 1940, petitioner, having reasonable grounds for believing that respondent was violating Sections 7, 11(c), 5(a)(2), and 15(a)(5) of the Act, sought through Elbert Shaw, Clifford C. Wills, Howard E. Hilbun, and Adrian Roberts, his duly authorized representatives, to make an investigation of respondent's business pursuant to Section 11(a) of the Act. At various times since October, 1940, and in connection with such investigations, Messrs. Shaw, Wills, Hilbun, and Roberts requested respondent, and one of its attorneys, Eli A. Weston, to permit them on behalf of the petitioner to inspect respondent's books and records. At all times respondent refused to permit such inspection as appears more fully from the affidavits of said Elbert Shaw, Clifford C. Wills, Howard E. Hilbun, and Adrian Roberts, attached hereto, marked Exhibit "A", Exhibit "B", Exhibit "C", and Exhibit "D", respectively, and by reference incorporated herein.

VII.

A subpoena duces tecum was duly issued and signed by said Administrator, requiring respondent to appear before Howard E. Hilbun, Clifford C. Wills, and Karl M. Rodman, officers of the Wage and Hour Division, United States Department of Labor, designated therein at the Rogerson Hotel, in the City of Twin Falls, State of Idaho, on the 18th day of August, 1944, at 10:00 o'clock in the forenoon of that date, and to produce specific books, papers, documents, and records. Said subpoena

duces tecum was duly served upon respondents by delivering a duplicate original copy thereof to C. H. Detweiler, president of respondent, at its place of business, at Twin Falls, Idaho, [5] on July 28, 1944. A copy of said subpoena duces tecum, with the return thereof, is annexed hereto and marked Exhibit "E" and made a part hereof.

VIII.

Upon information and belief: At all times herein stated the said C. H. Detweiler, as an officer of respondent, had and has custody and control of the books, papers, documents, and records described in said subpoena duces tecum.

IX.

At 10:00 A.M., on the 18th day of August, 1944, Howard E. Hilbun, an officer of the Wage and Hour Division, designated in said subpoena duces tecum, was present at the Rogerson Hotel, in the City of Twin Falls, State of Idaho, for the purpose of examining the books, papers, documents, and records, production of which was required by the said subpoena, but respondent failed and refused to place before the said officer, or to produce the said books, papers, documents, and records, although one of respondent's attorneys, R. H. Parry of Twin Falls, Idaho, appeared at the said time and place to state that respondent would not produce the said books, papers, documents, and records required by the subpoena, as is more fully set forth in the affidavit of said Howard E. Hilbun, annexed hereto, and marked Exhibit "C", and made a part hereof.

X.

All of the books, records, papers, documents, and memoranda required to be produced by said subpoena were at the time of the issuance of said subpoena, and are now, relevant, material and appropriate to determine whether respondent has violated Sections 6, 7, 11(c), 15(a)(2), and 15(a)(5) of the Act and will aid in the enforcement of the provisions of the Act.

XI.

The books, records, papers, documents, and memoranda required to be produced by said subpoena were at the time of the issuance and service of said subpoena, and are now, in the [6] possession, custody and control of respondent.

XII.

The refusal of respondent to appear before said officers and there produce the papers, books and documents required by said subpoena *duces tecum* has impeded and continues to impede said investigation.

XIII.

No previous application has been made for the relief requested herein.

Wherefore, petitioner respectfully prays:

(a) That an order to show cause issue forthwith directing respondent to appear before this Court upon a day certain and show cause, if any it has, why an order should not issue requiring respondent to appear before petitioner, or one of the officers designated by him, at such time and place as the

Court may order, and there to produce the documentary evidence and to give evidence as required by said subpoena duces tecum.

(b) That upon return of said order to show cause, an order issue requiring respondent to appear before petitioner, or one of the officers designated by him, at such time and place as this Court may order, and there to produce the documentary evidence and to give evidence as required by said subpoena duces tecum.

(c) That the petitioner have such other and further relief as may be necessary or appropriate.

DOUGLAS B. MAGGS

Solicitor

ARCHIBALD COX

Associate Solicitor

DOROTHY WILLIAMS

Regional Attorney

Post Office Address: c/o Wage and Hour Division,
U.S. Court House, Old, Portland, 4, Oregon. or:

[7]

c/o Wage and Hour Division, U.S. Department of
Labor, 402 Federal Building, Boise, Idaho

KARL M. RODMAN

Attorney United States De-
partment of Labor, Attor-
neys for Petitioner

State of Idaho

County of Ada—ss.

Howard E. Hilbun, being first duly sworn, de-
poses and says:

That he is a senior inspector for the Wage and

Hour Division, United States Department of Labor; that he has read the foregoing application for an order of this Court and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HOWARD E. HILBUN

Sworn and subscribed to before me this 6th day of October, 1944.

[Seal] F. JOS. KEENAN

Notary Public in and for the County of Ada, State of Idaho. Comm. Expires 9-27-47. [8]

EXHIBIT "A"

AFFIDAVIT OF ELBERT SHAW

State of Idaho,
County of Ada—ss.

Elbert Shaw, being duly sworn, deposes and says:

I am a resident of Boise, County of Ada, State of Idaho. I am an Inspector in the Wage and Hour Division, United States Department of Labor, stationed in Boise, Idaho.

On May 12, 1943, accompanied by Inspector Clifford C. Wills of the Boise office of the Wage and Hour Division, United States Department of Labor, I called at the office of Detweiler Bros., Inc. at 144 Second Avenue, North, Twin Falls, Idaho, and asked permission of Mr. Skinner, Office Manager of the company, to examine the company's records relating to interstate purchases, shipments, and records of hours worked and wages paid the company's

employees, for the purpose of an investigation under the Fair Labor Standards Act.

Mr. Skinner procured these records and granted us permission to examine them. As we began to examine the records, Mr. C. H. Detweiler, President of the company, returned to the office and ordered the examination of the records discontinued and this order was complied with.

Whereupon a conference was held, in which Mr. C. H. Detweiler, Mr. R. P. Parry, one of the company's attorneys, Inspector Clifford C. Wills, and I participated. Mr. Parry stated that the company was convinced that it was entitled to the exemption provided by Section 12(a)(2) of the Fair Labor Standards Act, and that, therefore, the company would refuse to permit an examination of its records.

On May 21, 1943, accompanied by Inspector Clifford C. Wills, I again called at the office of Detweiler Bros., Inc. at 144 Second Avenue, North, Twin Falls, Idaho, and requested access to the company's records. Mr. Detweiler, President of the company, refused to permit us to examine the records and [9] stated that the entire matter had been referred to Eli A. Weston, attorney at law at Boise, Idaho, and that any further negotiations would have to be carried on with Mr. Weston.

Following Mr. C. H. Detweiler's directions Inspector Clifford C. Wills and I wrote a letter, dated May 24, 1943, addressed to Mr. Weston, requesting permission to examine the records of Detweiler Bros., Inc. Mr. Weston replied to our letter by

letter dated June 7, 1943, addressed to Inspector Wills, in which he stated that his (Mr. Weston's) letter constituted our authority to inspect the sales invoices and accounts receivable for a representative period of at least twelve months and to inspect the payroll records of Detweiler Bros., Inc. from such date as we desired to designate. Mr. Weston indicated that a copy of his letter was being sent to Detweiler Bros., Inc. Copies of the letters referred to above, sent by Inspector Wills and myself and reply received from Mr. Weston, are attached to this affidavit and are incorporated herein by reference.

Pursuant to Mr. Weston's letter of June 7, 1943, Inspector Wills and I made four attempts to contact Mr. C. H. Detweiler without success, during the period from June 7, 1943 to November 23, 1943.

On November 24, 1943, I again called at the office of Detweiler Bros., Inc., 144 Second Avenue, North, Twin Falls, Idaho, and asked Mr. C. H. Detweiler for permission to examine the company's records. Mr. Detweiler refused to permit me to examine the records and stated he would permit such examination of the records only in the presence of Mr. Eli A. Weston. Whereupon, Mr. Detweiler, in my presence, telephoned Mr. Weston and an appointment was made for December 1, 1943 at the offices of the Detweiler Bros., Inc., Twin Falls, Idaho, at which time Mr. Weston would be present and Mr. Detweiler would permit the examination of the records.

ELBERT SHAW

Elbert Shaw [10]

Subscribed And Sworn To before me this 3 day
of Oct., 1944.

[Seal]

HARRY W. POULSON

Notary Public in and for the County of Ada, State
of Idaho. [11]

(Copy)

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
402 Federal Building
Boise, Idaho
May 24, 1943

Mr. Eli A. Weston, Attorney,
Sonna Building,
Boise, Idaho

Dear Sir:

This is to inform you that on May 12, 1943, Inspectors Clifford C. Wills and Elbert Shaw called at the establishment of Detweiler Bros., Inc., in Twin Falls, Idaho, for the purpose of conducting an inspection to determine the state of compliance with the provisions of the Fair Labor Standards Act of 1938.

Mr. C. H. Detweiler, president of the concern stated that in his opinion the operations were not subject to the provisions of the Act. The inspectors made known to Mr. Detweiler that it was in line of duty to ascertain from records the facts which would establish whether or not coverage did exist.

Mr. Detweiler then requested that we delay the inspection until he could confer with legal counsel. The inspectors readily agreed setting a tentative

date of May 15, 1943 for continuance of the investigation. Due to unforeseen delays it was impossible to keep this appointment and on May 21, 1943 the inspectors called again after Mr. Detweiler had been notified by letter dated May 19, 1943.

At this time the inspectors were advised that the case had been referred to you and that further negotiations should be handled directly with you. He refused to make available the records necessary for determining coverage and stated that said records would be made available only upon your recommendations.

In view of Mr. Detweiler's contention that he is operating a retail service establishment and is entitled to the exemptions provided in Section 13(a)2 of the Act, it will be necessary for us to inspect sales invoices and accounts receivable for a representative period of at least 12 months and payroll records from October 24, 1938 to the present date.

At this point in the investigation it is impossible to state the exact records necessary to establish the facts in the case and it is imperative that we be immediately advised as to your intentions regarding the making available of such records as may be deemed necessary.

Very truly yours,

CLIFFORD C. WILLS

ELBERT SHAW

Inspectors [12]

(Copy)

Eli A. Weston
Attorney at Law
Boise, Idaho.

June 7, 1943.

Mr. Clifford C. Wills, Inspector
Wage and Hour Division
Federal Building
Boise, Idaho

Dear Mr. Wills:

I apologize for not answering yours of the 24th before this. I, frankly, had expected to talk with you and with Mr. Detweiler in an effort to straighten out this case, without further inspection, but we seem to be quite far apart in our views and a further inspection will probably be necessary.

You have asked for permission to review the records of the Detweiler Brothers, Inc., for the purpose of determining coverage under the Fair Labor Standards Act and, specifically, to inspect the sales invoices and accounts receivable for a representative period of at least twelve months; also, the entire pay roll record from October 24, 1938 to the present date.

I am of the opinion that you are entitled to examine these records and for the purpose you specify. I wonder, however, if it is necessary to go clear back to October 24, 1938, as I understand you adopted a policy some time ago of going back only to some date in 1940, I believe it was August.

You may take this letter as your authority to inspect the sales invoices and accounts receivable for a representative period of at least twelve months, and to inspect the pay roll records of the Detweiler Brothers, Inc., from such date as you desire to designate. I am sending a copy of this letter to Detweiler Brothers, Inc., in Twin Falls.

Very truly yours,

ELI A. WESTON /s/

EAW:p [13]

EXHIBIT "B"

AFFIDAVIT OF CLIFFORD C. WILLS

State of Wyoming,
County of Teton—ss.

Clifford C. Wills, being duly sworn, deposes and says:

I am a resident of Jackson, County of Teton, State of Wyoming. I was, during the period and on the dates mentioned below, an Inspector in the Wage and Hour Division, United States Department of Labor, stationed in Boise, Idaho.

On May 12, 1943, accompanied by Inspector Elbert Shaw of the Boise office of the Wage and Hour Division, United States Department of Labor, I called at the office of Detweiler Bros., Inc. at 144 Second Avenue, North, Twin Falls, Idaho, and asked permission of Mr. Skinner, Office Manager of the company, to examine the company's records relating to interstate purchases, shipments, and records of hours worked and wages paid the com-

pany's employees, for the purpose of an investigation under the Fair Labor Standards Act.

Mr. Skinner procured these records and granted us permission to examine them. As we began to examine the records, Mr. C. H. Detweiler, President of the company, returned to the office and ordered the examination of the records discontinued and this order was complied with.

Whereupon a conference was held, in which Mr. C. H. Detweiler, Mr. R. P. Parry, one of the company's attorneys, Inspector Elbert Shaw, and I participated. Mr. Parry stated that the company was convinced that it was entitled to the exemption provided by Section 13(a) (2) of the Fair Labor Standards Act, and that, therefore, the company would refuse to permit an examination of its records.

On May 21, 1943, accompanied by Inspector Elbert Shaw, I again called at the office of Detweiler Bros., Inc. at 144 Second Avenue, North, Twin Falls, Idaho, and requested access to the company's records. Mr. C. H. Detweiler, President of [14] the company, refused to permit us to examine the records and stated that the entire matter had been referred to Eli A. Weston, attorney at law at Boise, Idaho, and that any further negotiations would have to be carried on with Mr. Weston.

Following Mr. C. H. Detweiler's directions, Inspector Elbert Shaw and I wrote a letter, dated May 24, 1943, addressed to Mr. Weston, requesting permission to examine the records of Detweiler Bros., Inc. Mr. Weston replied to our letter by

letter dated June 7, 1943, addressed to me, in which he stated that his letter constituted our authority to inspect the sales invoices and accounts receivable for a representative period of at least twelve months and to inspect the payroll records of Detweiler Bros., Inc. from such date as we desired to designate. Mr. Weston indicated that a copy of his letter was being sent to Detweiler Bros., Inc. Copies of the letters referred to above, sent by Inspector Shaw and myself and reply received from Mr. Weston, are attached to this affidavit and are incorporated herein by reference.

Pursuant to Mr. Weston's letter of June 7, 1943, Inspector Shaw and I made four attempts to contact Mr. C. H. Detweiler without success, during the period from June 7, 1943 to November 23, 1943.

To keep the appointment made by Mr. C. H. Detweiler, President of the company, and Inspector Elbert Shaw for an examination of the company's records, to be made in the presence of Mr. Eli A. Weston, at the offices of the company in Twin Falls, Idaho, on December 1, 1943, accompanied by Senior Inspector Howard E. Hilbun of the Wage and Hour Division, United States Department of Labor, I called at the offices of the company on December 1, 1943 and again requested permission to examine the records of Detweiler Bros., Inc. of Mr. C. H. Detweiler, President of the company. These records were again refused us.

CLIFFORD C. WILLS

Clifford C. Wills [15]

Subscribed and Sworn To before me this 26 day of Sept., 1944.

[Seal] R. P. STEVENS

Notary Public in and for the County of Teton,
State of Wyoming.

My commission expires July 14, 1945. [16]

(Copy)

U. S. Department of Labor
Wage and Hour and Public Contracts Divisions
402 Federal Building
Boise, Idaho

May 24, 1943.

Mr. Eli A. Weston, Attorney,
Sonna Building,
Boise, Idaho.

Dear Sir:

This is to inform you that on May 12, 1943, Inspectors Clifford C. Wills and Elbert Shaw called at the establishment of Detweiler Bros., Inc., in Twin Falls, Idaho, for the purpose of conducting an inspection to determine the state of compliance with the provisions of the Fair Labor Standards Act of 1938.

Mr. C. H. Detweiler, president of the concern stated that in his opinion the operations were not subject to the provisions of the Act. The inspectors made known to Mr. Detweiler that it was in line of duty to ascertain from records the facts which would establish whether or not coverage did exist.

Mr. Detweiler then requested that we delay the inspection until he could confer with legal counsel. The inspectors readily agreed setting a tentative date of May 15, 1943 for continuance of the investigation. Due to unforeseen delays it was impossible to keep this appointment and on May 21, 1943 the inspectors called again after Mr. Detweiler had been notified by letter dated May 19, 1943.

At this time the inspectors were advised that the case had been referred to you and that further negotiations should be handled directly with you. He refused to make available the records necessary for determining coverage and stated that said records would be made available only upon your recommendations.

In view of Mr. Detweiler's contention that he is operating a retail service establishment and is entitled to the exemptions provided in Section 13 (a)2 of the Act, it will be necessary for us to inspect sales invoices and accounts receivable for a representative period of at least 12 months and payroll records from October 24, 1938 to the present date.

At this point in the investigation it is impossible to state the exact records necessary to establish the facts in the case and it is imperative that we be immediately advised as to your intentions regarding the making available of such records as may be deemed necessary.

Very truly yours,

CLIFFORD C. WILLS

Clifford C. Wills

ELBERT SHAW

Inspectors [17]

EXHIBIT "C"

AFFIDAVIT OF HOWARD E. HILBUN

State of Idaho,

County of Ada—ss.

Howard E. Hilbun, being duly sworn, deposes and says:

I am a resident of Boise, County of Ada, State of Idaho. I am a Senior Inspector in the Wage and Hour Division, United States Department of Labor, stationed in Boise, Idaho.

To keep the appointment made by Mr. C. H. Detweiler, President of the company, and Inspector Elbert Shaw for an examination of the company's records, to be made in the presence of Mr. Eli A. Weston, at the offices of the company in Twin Falls, Idaho, on December 1, 1943, accompanied by Inspector Clifford C. Wills of the Wage and Hour Division, United States Department of Labor, I called at the offices of the company on December 1, 1943 and requested permission to examine the records of Detweiler Bros., Inc. of Mr. C. H. Detweiler, President of the company. These records were refused us.

At 10:00 A.M., on August 18, 1944, I, as an officer designated by the Administrator in the subpoena duces tecum served on Detweiler Bros., Inc., was present at the Rogerson Hotel, Twin Falls, Idaho, for the purpose of taking testimony and examining and copying the books, papers and documents which said subpoena duces tecum required

Detweiler Bros., Inc. to produce at said time and place, but the company failed and refused to produce said documentary evidence of any part thereof, although R. P. Parry, one of the company's attorneys, did appear at the time and place specified in the subpoena and stated that it was the company's intention not to appear or to produce the books, papers and documents specified in the said subpoena.

HOWARD E. HILBUN

Howard E. Hilbun

Subscribed and Sworn to before me this 3 day of Oct., 1944. [19]

[Seal]

HARRY W. POULSON

Notary Public in and for the County of Ada, State of Idaho. [20]

EXHIBIT "D"

AFFIDAVIT OF ADRIAN ROBERTS

State of Oregon,

County of Multnomah—ss.

Adrian Roberts, being duly sworn, deposes and says:

I am a resident of Oak Grove, County of Clackamas, State of Oregon. I am a Supervising Inspector in the Wage and Hour Division, United States Department of Labor, stationed in Portland, Oregon.

On December 16, 1943, accompanied by Senior Inspector Howard E. Hilbun, I conferred with Mr. Eli A. Weston, one of the attorneys for Detweiler

Bros., Inc., in Boise, Idaho, and asked for permission to examine the company's records, pursuant to Section 11(c) of the Fair Labor Standards Act. Mr. Weston informed me that he would again consult with his client and would advise me by noon of December 18, 1943, whether the company would be willing to permit the Wage and Hour Division to examine its records. Mr. Weston and I agreed that unless I heard from him by noon of December 18, 1943, I could assume that Detweiler Bros., Inc. refused to permit the Wage and Hour Division to make an examination of its records, relating to interstate commerce, wages, hours, and other conditions of employment. No word was ever received from Mr. Weston by noon of December 18, 1943, or thereafter.

ADRIAN ROBERTS

Adrian Roberts

Subscribed and Sworn To before me this 26th day of September, 1944.

[Seal] NAN FRISBEE

Notary Public in and for the County of Multnomah, State of Oregon.

Notary Public in and for the State of Oregon. My commission expires January 7, 1947. [21]

EXHIBIT "E"

United States of America
Department of Labor
Wage and Hour Division

SUBPENA DUCES TECUM

To Detweiler Bros., Inc., 144 Second Avenue,
North, Twin Falls, Idaho

At the instance of the Administrator, Wage and Hour Division, Department of Labor, you are hereby required to appear before Howard E. Hilbun or Clifford C. Wills, Inspectors, or Karl M. Rodman, Attorney, or any of them, of the Wage and Hour Division, Department of Labor, at Rogerson Hotel, 157 Main Avenue East in the City of Twin Falls, Idaho on the 18th day of August, 1944, at 10:00 o'clock a.m. of that day, to testify In the Matter of Detweiler Bros., Inc., a Corporation involving an investigation pursuant to the provisions of Sections 9 and 11(a) of the Fair Labor Standards Act of 1938, of complaints of violations by the said Corporation of Sections 7(a), 11(c), 15(a)(1), 15(a)(2) and 15(a)(5) of the said Act.

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents:

(1) Any and all books and records which record the wages paid to your employees during the period from October 24, 1940, to date.

(2) Any and all books, documents, time cards, time sheets, papers or memoranda made or kept

by you which record the hours worked each work-day and each workweek by your said employees during the period from October 24, 1940, to date.

(3) Any and all books, records, documents, receiving slips, invoices or memoranda of purchase and shipments received by you from points outside the State of Idaho during the period from October 24, 1940, to date.

(4) Any and all invoices, shipping receipts, copies of bills of lading or other documents, records or memoranda pertaining to goods sold, shipped, delivered, transported or offered for transportation from your establishment in Twin Falls, Idaho, during the period from October 24, 1940, to date.

Fail Not At Your Peril

In testimony whereof, the seal of the Department of [22] Labor is affixed hereto, and the undersigned, the Administrator of the Wage and Hour Division of said Department of Labor, has hereunto set his hand at New York this 17 day of July, 1944.

L. METCALFE WALLING

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was

Duly served (Indicate by check method used.) in person. ☒ by leaving at principal office or place of business, to wit:

on the person named herein on July 28, 1944,
(Month, day, year)

EARLE B. WILLIAMS

(Name of person making
service)

Deputy U. S. Marshal
(Official title)

I certify that the person named herein was in attendance as a witness at on (Month, day or days, and year). (Name of person certifying). (Official title).

[Endorsed]: Filed Oct. 6, 1944. [23]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the petition of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, duly verified the 6th day of October, 1944, and filed herein on the 6th day of October, 1944, and the exhibits annexed thereto, it is hereby

Ordered that respondent, Detweiler Bros., Inc., show cause, if there *by* any, before this Court, in the United States Court House, the Federal Building, Pocatello, Idaho, on the 18th day of October, 1944, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, why an order of this Court should not issue requiring said respondent to appear before L. Metcalfe Wall-

ing, Administrator of the Wage and Hour Division, United States Department of Labor, or an officer of the Wage and Hour Division, designated by him, at such time and place as this Court may determine, and there to produce the following books, papers, documents and records:

1. Any and all books and records which record the wages paid to your employees during the period from October 24, 1940, to date.

2. Any and all books, documents, time cards, time sheets, papers or memoranda made or kept by you which record the hours worked each workday and each workweek by your said employees during the period from October 24, 1940, to date.

3. Any and all books, records, documents, receiving slips, invoices or memoranda of purchases and shipments received by you from points outside the State of Idaho during the period from October 24, 1940, to date.

4. Any and all invoices, shipping receipts, copies of bills of lading or other documents, records or memoranda pertaining to goods sold, shipped, delivered, transported or offered for transportation from your establishment in Twin Falls, Idaho, during the period from October 24, 1940, to date.

And to give evidence as required by a subpoena duces tecum of the Administrator of the Wage and Hour Division which was duly served upon respondent in connection with the investigation of the said Detweiler Bros., Inc., pursuant to Section 9 [24] and 11(a) of the Fair Labor Standards Act, 1938, (52 Stat. 1060); and it is

Further Ordered that service of a copy of this Order to Show Cause, together with copy of said petition of L. Metcalfe Walling, be made upon respondent on or before the 9th day of October 1944, and that such service be deemed sufficient service.

Dated: Oct 6th 1944.

CHASE A. CLARK

United States District Judge.

Attest:

[Seal]

W. D. McREYNOLDS

Clerk

RETURN ON SERVICE OF WRIT

United States of America,

District of Idaho—ss.

I hereby certify and return that I served the annexed Order to Show Cause, together with Petition of L. Metcalfe Walling on the therein-named Detweiler Brothers, a corporation by handing to and leaving a true and correct copy thereof with George Detweiler, Secretary of the Detweiler Bros. Corporation personally at Twin Falls, Idaho in said District on the 9th day of Oct. 1944, 19...

ED M. BRYAN

U. S. Marshal

By DAVE NICHOLS

Deputy

[Endorsed]: Filed Oct. 13, 1944. [25]

[Title of District Court and Cause].

ANSWER TO APPLICATION

Comes Now The Respondent above named and for its Answer to the Application To Compel Respondent To Attend, Testify and Produce Documentary Evidence shows the Court as follows:

1.

Respondent represents to the Court that the so-called Application herein fails to state facts sufficient to constitute a cause of action in favor of the Petitioner and against the Respondent or any facts sufficient to constitute a cause of action in favor of the Petitioner and against the Respondent or any facts which entitles the Petitioner to the relief sought herein.

2.

That the so-called Application herein fails to state any facts which would give this Court jurisdiction to grant the relief asked for in said Application and it appears on the face of the said Application that the Court does not have jurisdiction to grant the relief sought.

3.

Answering Paragraph I of the Application, Respondent admits the allegations thereof except only that it denies that the Administrator, or his designated representatives are empowered by Section 11(a) of the Act to investigate, enter and inspect all places and all records, and in particu-

lar to investigate, enter and inspect respondent's place of business and Respondent's records, whenever the Administrator may deem it necessary or appropriate to determine whether any person has violated any provision of the Act, or which may aid in the enforcement of the provisions of the Act; and further denies that the Administrator has the power to issue and cause to be served upon any person a subpoena requiring the attendance and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation, and in particular denies that the Administrator has the power to issue and cause to be served upon Respondent a subpoena requiring the attendance [26] and testimony of witnesses and the production of all documentary evidence relating to any matter under investigation.

4.

Answering Paragraph II of the Application, Respondent admits the existence of the statutes therein referred to but alleges that under the facts and circumstances present in this matter and upon the face of the Application herein this Court does not have the jurisdiction to grant the relief prayed for and alleges that under the facts and circumstances present in this matter and upon the face of the Application herein this Court does not have jurisdiction either over the person of the Respondent or the subject matter to grant the relief sought in the Application.

5.

Answering Paragraph III of the Application, Respondent admits the allegations thereof.

6.

Answering Paragraph IV of the Application, Respondent admits the allegations thereof.

7.

Answering Paragraph V of the Application, Respondent admits that it is in the business of purchasing, selling and installing sheet metal and heating supplies but alleges that the said acts and all of them are done solely in connection with its retail service establishment; denies that it is engaged in the business of manufacturing, producing or shipping plumbing, sheet metal and heating supplies; and denies that in connection with such purchase, sale and installation, or in connection with anything whatsoever or at all that is done by it, that it is engaged in the production of goods for interstate commerce; and denies that it is engaged in interstate commerce within the meaning of the Fair Labor Standards Act of 1938.

That Respondent's place of business is a retail store on Second Avenue North in the business district of Twin Falls, Idaho; that Respondent's principal business is the sale, at retail, of household appliances in and about the City of Twin Falls [27] which is a city of about eleven thousand population; and that in connection with its business, Respondent operates in the back end of its place of business a plumbing shop such as is usual and

customary in retail establishments in such small cities, and does only such plumbing work as may be incidental to the installation of appliances sold by it, or upon call from retail customers, or in connection with the construction of new buildings in and around Twin Falls; and that likewise it operates in the rear of its store a shop where sheet metal work can be done and does for retail customers such sheet metal work as may be incidental to the installation of furnaces or other household appliances, or upon call from retail customers, or in new construction work for retail customers.

That the only purchasing done by it is the purchasing, in the usual course of business, of articles for resale by it at retail to its retail customers; that it does not do any manufacturing or producing; except only if said words be deemed to include doing sheet metal work for installation for retail customers which is the only work of such character done by Respondent; that all of its sales are at retail and that it makes no wholesale sales whatsoever; that all installations are done for the ultimate retail customer; that it is not engaged in shipping anything unless such word would include the transportation of material from Respondent's store to the place of use by the ultimate retail consumer.

That all of Respondent's sales are made, and all services performed by Respondent, solely within the State of Idaho and that Respondent does not make sales or perform services in any other state.

8.

Answering Paragraph VI of the so-called Application, Respondent denies that Petitioner has reasonable grounds or any grounds whatsoever for believing that Respondent has violated the statutory sections therein cited and admits the remaining allegations thereof and alleges that no facts have been asserted which would give to Petitioner, and Petitioner could not have, [28] any grounds for believing that Respondent was within the terms of the statutes cited or could be guilty of any violation thereof.

9.

Answering Paragraph VII of the so-called Application, Respondent admits the allegations thereof.

10.

Answering Paragraph VII of the so-called Application, Respondent admits the allegations thereof.

11.

Answering Paragraph IX of said Application, Respondent admits the allegations therein contained and alleges that it explained its refusal to obey said Subpoena by a letter from its Attorney, a copy of which is hereto attached marked Exhibit 1, and by reference made a part hereof.

12.

Respondent denies each and all and every of the allegations of Paragraph X.

13.

Answering Paragraph XI of the so-called Application, Respondent admits the allegations thereof.

14.

Respondent denies each and all and every of the allegations of Paragraph XII.

15.

Answering Paragraph XIII of the so-called Application, Respondent admits the allegations thereof.

Wherefore, Having fully answered the Application herein, Respondent prays the Court for an Order dismissing the said Application and denying the Petitioner any relief herein and that Respondent may have such other and further relief as may be necessary and proper.

PARRY & THOMAN

R. P. PARRY

J. P. THOMAN

Attorneys for Respondent,
Residing at Twin Falls,
Idaho. [29]

State of Idaho,
County of Bannock—ss.

R. P. Parry, being first duly sworn, deposes and says:

That he has read the foregoing Answer to Application and verily believes the same to be true, and that he makes this verification for the reason

that at this time all of the officers of the Respondent are outside of the County wherein this affiant resides and this verification is made.

R. P. PARRY

Subscribed and Sworn to before me this 8th day of October, 1944.

[Seal]

O. R. BAUM

Notary Public, Residing at
Pocatello, Idaho [30]

EXHIBIT No. 1

August 14, 1944.

Mr. Howard E. Hilbun
Wage and Hour Division
Department of Labor
Boise, Idaho.

Re: Detweiler Bros., Inc.

Wage and Hour Division Subpoena
Duces Tecum. Our No. 5034-D.

My dear Mr. Hilbun:

Our clients, Detweiler Bros., Inc. have shown us a Subpoena Duces Tecum issued by Mr. Walling in New York on July 17, 1944, commanding them to present to you or to other named persons all their books and records at 10 A. M. on August 18, at the Rogerson Hotel in Twin Falls, Idaho.

From the facts made available to us in our investigation of the law, it is our opinion that Detweiler Bros., Inc., are not subject to the provisions of the Act referred to in the Subpoena and that consequently the Subpoena Duces Tecum in ques-

tion has no validity, force or effect. This client's business is simply a small town retail and service establishment, doing a strictly intrastate business. It is for these reasons that we express the above opinion.

Accordingly, this letter is to advise you that our client will not obey the Subpoena and we will not have the records available at the time and place indicated. We are advising in advance in order to save your Department the time and money of making an unnecessary appearance at this time and place.

You realize that our client's attitude is not one of captiousness or arbitrary defiance. It is simply our thought that we are entitled to an orderly decision upon the question of whether or not the Act applies to our clients, in advance of any lengthy inspection of all of the voluminous books and records so sweepingly referred to in the Subpoena.

We are, of course, willing to review this matter further and consider giving our client different advice in the premises if you can show us that the Act does apply to our client and that as a matter of law it is obligated to obey the Subpoena. We would be willing to carefully consider anything you have to offer on this subject.

Yours very truly,

PARRY AND THOMAN

By R. P. PARRY

RPP:EF

[Endorsed]: Filed Oct. 18, 1944. [31]

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho

County of Twin Falls—ss.

George Detweiler, being first duly sworn, deposes and says:

That he is the Secretary of the Respondent corporation and as such is familiar with the matters and things herein set forth;

That said Respondent is purely a retail service organization and nothing more, operating a retail store in downtown Twin Falls wherein it sells principally household appliances; and that in connection therewith, it has developed a general retail plumbing business and a general retail sheet metal department;

That its purchases are limited solely to purchasing those things which it sells at retail to the ultimate consumer; that its selling is limited solely to retail selling and it does no wholesale business whatsoever; and that its installing is done solely for the ultimate retail consumer;

That all of its business is done in Twin Falls, Idaho, or in the trade area immediately around Twin Falls area and all of it in the State of Idaho; it does no business in any other state whatsoever.

That it does no manufacturing or producing of any of the finished products which it sells; that its sheet metal work is of course fabrication work but all such work done by the Respondent is specific work for specific jobs of installation for specific

retail customers, and it does not manufacture in any sense any object for sale as such but does work only for installation in specific places and in specific buildings and in connection with its business, principally the installation of furnaces. [32]

That Respondent is not engaged in transportation in any sense whatsoever unless such work would cover the movement by its trucks of goods to the home or building of its retail customers and that it does no other transportation of any kind.

That the books and records requested in the Subpena Duces Tecum served herein would of necessity be voluminous in that many of the sales at Respondent's store are for as little as Fifty Cents or One Dollar, and to bring in all records of sales made by the Respondent in such retail business would require the production of many records and involve the loss of much manpower at a critical time, and involve much work; and likewise all of the other records asked for by the Subpena which relate solely to intra-state business are voluminous and lengthy; and that to have answered the Subpena would have meant the production of at least a truck load of books and records in the lobby of the hotel at the specified time.

That Respondent is now so short of manpower that it cannot answer calls for plumbers and repair men sufficient to attend to the sanitation needs of the community, and that at this time to take the time of the managing officers or of assistants on a fishing expedition to go through this whole mass of

records would be decidedly contrary to the war effort.

GEO. H. DETWEILER

Subscribed and Sworn to before me this 17th day of October, 1944.

J. R. KEENAN

Notary Public, Twin Falls,
Idaho.

[Endorsed]: Filed Oct. 18, 1944. [33]

[Title of District Court and Cause.]

REQUEST FOR PERMISSION TO FILE
SUPPLEMENTAL AFFIDAVIT

Comes Now the Respondent in the above entitled action prior to the final submission of the matter and requests the Court for permission to file a Supplemental Affidavit therein to be considered along with and as a part of the Affidavit already filed by Respondent.

Dated this 19th day of October, 1944.

PARRY & THOMAN

R. P. PARRY

Attorneys for Respondent

Residence and P. O. Address:

‡ Twin Falls, Idaho.

ORDER

Permission to file Supplemental Affidavit as above requested is hereby granted.

Dated this 23d day of October, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed Oct. 23, 1944. [34]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT

George Detweiler, being first duly sworn, deposes and says:

That he makes this Affidavit as supplemental to and to be considered with his Affidavit of October 17, 1944, and on file herein.

That in said Affidavit he was referring only to those matters and things raised by the petition herein, namely, the plumbing and sheet metal work done by Respondent; that in order that the Court may not be in any way misled, he desires to state that in stating that Respondent is not engaged in manufacturing, he wants to make it clear that this is true unless said word includes certain other service work done for the retail consumer by Respondent in connection with its retail service business of insulating homes. That in this connection, Respondent purchases diatomaceous earth in Idaho which it mixes by machine with paper, places in sacks and in turn sells it to and installs it in the attic and

walls of the buildings of the ultimate retail consumer; that in no case does it sell to a middleman who in turn makes the installations; that in no case does it sell it for resale, and all such sales and installations are made in the State of Idaho in its immediate trade area; that Respondent does not consider this as manufacturing, but only as one incident in its retail service.

Also Respondent states that of course a large percentage of the household appliances sold by it in its Twin Falls store to the retail consumers are by it received from outside the State of Idaho.

GEO. H. DETWEILER

Subscribed and Sworn to before me this 19th day of October, 1944.

[Seal]

J. R. KEENAN

Notary Public, residing at
Twin Falls, Idaho.

[Endorsed]: Filed Oct. 23, 1944. [35]

[Title of District Court and Cause.]

REQUEST FOR PERMISSION TO FILE
SUPPLEMENTAL AFFIDAVIT

Petitioner in the above entitled action prior to the final submission of the matter requests this Court's permission to file a Supplemental Affidavit herein to be considered along with and as part of the petition and exhibits already filed by Petitioner.

Dated this 4th day of December, 1944.

DOUGLAS B. MAGGS

Solicitor

ARCHIBALD COX

Associate Solicitor

DOROTHY M. WILLIAMS

Regional Attorney

KARL M. RODMAN

Attorney

United States Department of
Labor

JOHN A. CARVER

United States Attorney

By E. H. CASTERLIN

Assistant United States
Attorney

United States Department of
Justice

Attorneys for Petitioner

[Endorsed]: Filed Dec. 4, 1944. [36]

[Title of District Court and Cause.]

ORDER

Permission to file Supplemental Affidavit as requested in Petitioner's motion of December 4th, 1944, is hereby granted.

Dated this 4th day of December, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed Dec. 4, 1944. [37]

[Title of District Court and Cause.]

AFFIDAVIT

State of Idaho

County of Ada—ss.

Howard E. Hilbun, being first duly sworn, deposes and says:

That he is a Senior Inspector in the Wage and Hour Division, United States Department of Labor; that he is the Inspector in Charge of the Boise Field office of the said Wage and Hour Division. That the conversations with the officers and attorneys of the Respondent and visits to the establishment of the Respondent set forth in the Administrator's petition and exhibits heretofore filed in this case were had with and made by himself and inspectors of the Wage and Hour Division attached to the Boise office and under his direction and supervision.

That he has been informed and believes that the Respondent normally maintains a stock of electrical and other appliances which it receives from points out of state and which it installs and services in industrial and commercial firms within the State of Idaho; that it is engaged in tin and sheet metal work for various types of industries including seed houses, flour mills, and creameries. That a portion of the floor space at Respondent's establishment is devoted to the manufacture of insulation material composed of shredded paper and quarried diatomaceous earth and that some of this material is sold to commercial and industrial users both within and without the State of Idaho.

That respondent engages in the manufacture and installation of plumbing and heating systems in commercial and industrial firms and also engages in servicing these plumbing and heating systems after they have been installed.

That respondent maintains a parts department which [38] constantly receives plumbing, heating, and refrigeration parts coming from out of state points and which are used by its plumbing, heating and other departments in installing and servicing plumbing and heating systems in commercial and industrial firms.

That many employees of the respondent from time to time engage in a variety of the activities performed by the respondent during the course of their regular work weeks.

HOWARD E. HILBUN

Subscribed and Sworn to before me this 4th day of December, 1944. Notary Public in and for the County of Ada, State of Idaho.

[Seal]

KENNETH CONOVER

Notary Public

My commission expires Feb. 19, 1948.

[Endorsed]: Filed Dec. 4, 1944. [39]

[Title of District Court and Cause.]

REQUEST FOR PERMISSION TO FILE
SUPPLEMENTAL AFFIDAVIT

Comes Now the Respondent in the above entitled action prior to the final submission of the matter, and requests the Court for permission to file an Affidavit as supplemental to and to be considered with his Supplemental Affidavit of October 19th, 1944 and his Affidavit of October 17th, 1944.

Dated this 13th day of December, 1944.

PARRY & THOMAN

R. P. PARRY

Attorneys for Respondent

Residence and P. O. Address:

Twin Falls, Idaho

ORDER

Permission to file Supplemental Affidavit as above requested is hereby granted.

CHASE A. CLARK

District Judge

[Endorsed]: Filed Dec. 15, 1944. [40]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT

State of Idaho

County of Twin Falls—ss.

George H. Detweiler, being first duly sworn, deposes and says:

That he makes this Affidavit as supplemental to and to be considered with his Supplemental Affidavit of October 19th, and his Affidavit of October 17th, 1944, and on file herein, and in answer to the Affidavit of Howard E. Hilbun.

That all of Respondent's sales are unit sales to the ultimate consumer and are made within the State of Idaho; that by unit sales, affiant means sales of a single item to the ultimate consumer or sales of small quantities of items to the ultimate consumer, and in no case does Respondent make sales of items in wholesale numbers to the ultimate consumer, or to anyone.

GEO. H. DETWEILER

Subscribed and Sworn to before me this 13th day of December, 1944.

[Seal]

J. R. KEENAN

Notary Public,

Residing at Twin Falls, Idaho

[Endorsed]: Filed Dec. 15, 1944. [41]

[Title of District Court and Cause.]

Douglas B. Maggs,

Archibald Cox,

Dorothy M. Williams,

Karl M. Rodman,

Attorneys for the Petitioner, Address, c/o
Wage & Hour Division U. S. Department of
Labor, 402 Federal Building, Boise, Idaho.

Messrs Parry & Thomas, Twin Falls, Idaho,
Attorneys for Respondent.

December 29, 1944

OPINION

Clark, District Judge.

This matter is before the Court on the petition of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the provisions of the Fair Labor Standards Act of 1938 (c) 676, 52 Stat. 1069; 29 USCA Section 201, applying to the Court for an order directing Detweiler Brothers Incorporated, respondent herein, to appear before the administrator or his representative and produce documentary evidence and give testimony as required by a subpoena duces tecum issued by the Administrator on the 17th day of July 1944.

Order to show cause was issued by this Court and at the time and place fixed by said order, the respondent appeared and answered the application and denied that the administrator or his designated representative is empowered to enter and inspect

its records or their place of business or that the administrator has power to issue and cause to be served upon respondent a subpoena requiring the attendance and testimony of witnesses and the production of all documentary evidence relating to its business, for the reason that it is [42] a retail establishment and all the services performed by it are solely within the State of Idaho.

On the date of the hearing on the order to show cause, the respondent filed a positive affidavit and later filed a supplemental affidavit, positively stating that they are a retail establishment and not within the Act, doing business solely within the State of Idaho. The affidavit of the administrator is on information and belief. The weight of the affidavits are in favor of the respondent as its affidavits are positive and the affidavit of the Administrator, as hereinbefore stated, is on information and belief.

The administrator contends that regardless of the fact that the respondent claims its establishment is one that is exempt as a retail establishment within the meaning of the Fair Labor Standards Act, that this is not an issue in the present hearing and that all that is required of the Administrator is to inform the Court, on information and belief that he has reason to believe that the respondent is within the Act, and that the Court has no discretion in the matter but to issue the order requiring the respondent to obey the subpoena of the Administrator.

The question, stated in a more concrete form, is whether or not the Administrator has the absolute right to examine the books and records in question

so that it can be determined whether there is a violation of the Fair Labor Standards Act.

The great weight of authority answers this in the affirmative. There is some authority that takes a contrary view. The Ninth Circuit Court of Appeals has not passed upon the question. However, the Supreme Court of the United States in the case of *Endicott Johnson Corporation v. Perkins*, Secretary of Labor, 317 U.S. 501 seems to be controlling on this question and has been cited as controlling by the Circuit Court of Appeals of the First Circuit in the case of *Martin Typewriter Company v. Walling*, 135 Fed (2d) 918.

In the *Endicott Johnson v. Perkins* case (*supra*) referring to the powers of the Secretary of Labor the Court said: * * * The evi- [43] dence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration."

Counsel for respondent asks why is it necessary for the Administrator to apply to the Federal Court for an enforcement Order if the Court is without authority or power to hear the matter and determine whether or not the respondent is covered by the Act? For what purpose did Congress provide the jurisdiction is conferred on the District Courts of the United States to act on the petition of the Administrator to require obedience of his subpoena?

After a careful study of the case of *Endicott Johnson v. Perkins*, *Supra.*, (in that no other

remedy is provided the Administrator to enforce his subpoena) I am convinced the only purpose of the hearing before this Court is to obtain an order, the disobedience of which would place the respondent in contempt of this Court's authority, and it is the conclusion of this Court that such an order should issue.

The Order will be prepared by the attorneys for the petitioner in accordance with this opinion, a copy to be served on counsel for respondent. The original will be submitted to the Court for approval.

[Endorsed]: Filed Dec. 30, 1944. [44]

[Title of District Court and Cause.]

ORDER

Application having been made by petitioner, L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, for an order directing respondent to appear before petitioner, or one of the officers designated by him, at such time and place as this Court may order, and there to produce certain books, records, papers and documents and give evidence as required by the subpoena duces tecum issued by petitioner and served upon respondent in connection with an investigation of respondent pursuant to sections 9 and 11(a) of the Fair Labor Standards Act of 1938; an order having been issued, upon said application, directing respondent to appear before this Court

to show cause why it should not be ordered to comply with said subpoena duces tecum; the order to show cause having been duly served upon respondent, and respondent having filed an answer to petitioner's application and appeared in response to the order to show cause;

Whereupon, after hearing and consideration of the application, answer, affidavits of both parties, briefs and arguments of counsel, and it appearing that this Court has jurisdiction to enforce said administrative subpoena, it is, by the Court

Ordered that respondent, Detweiler Bros., Inc., do appear before petitioner, or Howard E. Hilbun, Elbert Shaw, and Karl M. Rodman, officers duly designated by petitioner, at 10 AM o'clock on January 22, 1945, at the jury room, Twin Falls County Courthouse, Twin Falls, Idaho, and there produce the following books, records, papers and documents, and give evidence relating thereto, as is required by the aforesaid subpoena duces tecum of the Administrator of the Wage and Hour Division, to wit:

(1) Any and all books and records which record the wages paid to your employees during the period from October 24, 1940, to date. [45]

(2) Any and all books, documents, time cards, time sheets, papers or memoranda made or kept by you which record the hours worked each workday and workweek by your said employees during the period from October 24, 1940, to date.

(3) Any and all books, records, documents, receiving slips, invoices or memoranda of purchase

and shipments received by you from points outside the state of Idaho during the period from October 24, 1940, to date.

(4) Any and all invoices, shipping receipts, copies of bills of lading or other documents, records or memoranda pertaining to goods sold, shipped, delivered, transported or offered for transportation from your establishment in Twin Falls, Idaho, during the period from October 24, 1940, to date.

Jurisdiction of this matter is retained for the purpose of giving full effect to this order and of making such other and further orders or taking such other action, if any, as may become necessary or appropriate to carry out and enforce this order.

Dated: January 16th, 1945.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed Jan. 16, 1945. [46]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Detweiler Bros., Inc., a corporation, Respondent above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order directing Respondent to obey a subpoena duces tecum issued to it by Petitioner above named, entered in this action on the 11th day of January, 1945.

Dated January 16th, 1945.

PARRY AND THOMAN

R. P. PARRY

J. P. THOMAN

Attorneys for Respondent

Residence: Twin Falls, Idaho.

[Endorsed]: Filed Jan. 16, 1945. [47]

[Title of District Court and Cause.]

MOTION FOR SUPERSEDEAS

Respondent moves the Court to stay the enforcement of the Order in this action pending the disposition of Respondent's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for that purpose to fix the amount of the bond required to be filed by Respondent, and fix time within which said bond shall be filed.

PARRY AND THOMAN

R. P. PARRY

J. P. THOMAN

[Endorsed]: Filed Jan. 16, 1945. [48]

[Title of District Court and Cause.]

ORDER GRANTING SUPERSEDEAS

This cause came on to be heard on motion of respondent for a stay pending Respondent's appeal to the United States Circuit Court of Appeals for

the Ninth Circuit, and it appearing to the Court that Respondent is entitled to such a stay,

It Is Ordered that the execution of any proceedings to enforce the order entered herein on the 16th day of January, 1945, be stayed pending the determination of Respondent's appeal from such Order, upon the filing by Respondent and approval by this Court of a bond in the sum of \$500.00, and that Respondent is given until January 22, 1945 in which to file sale bond on appeal.

Dated this 16th day of January, 1945.

CHASE A. CLARK

District Judge.

[Endorsed]: Filed Jan. 16, 1945. [49]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That Detweiler Bros., Inc., a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation authorized to transact surety business in the State of Idaho, as surety, are held and firmly bound unto Petitioner above named in the full and just sum of Five Hundred Dollars (\$500.00) to be paid to the said Petitioner, his successors, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 19th day of January, 1945.

Whereas, on the 16th day of January, 1945, in an action pending in the United States District Court for the Southern District of the State of Idaho, between L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, as Petitioner, and Detweiler Bros., Inc., a corporation, as Respondent, an order was rendered against the said Respondent and the said Respondent having filed a Notice of Appeal from such Order [50] to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such, that if the said Respondent shall prosecute its appeal to completion and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the undersigned corporations have caused this instrument to be executed in their names by their respective officers or agents, all duly authorized in the premises.

[Seal]

DETWEILER BROS. INC.

a corporation

By C. H. DETWEILER

Its President

Countersigned:

[Seal]

PAUL R. FABER,

Agent

Twin Falls, Idaho

HARTFORD ACCIDENT AND
INDEMNITY COMPANY,
a corporation

By PAUL R. FABER

Its Attorney-in-fact

The above and foregoing bond is accepted and
approved this 22nd day of January, 1945.

CHASE A. CLARK

U. S. Federal Judge

[Endorsed]: Filed Jan. 22, 1945. [51]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Appellant designates the following portions of
the record, proceedings, and evidence to be con-
tained in the record on appeal in this action:

1. Subpoena duces tecum issued July 17, 1944.
2. Application to Compel Respondent to Attend,
Testify and Produce Documentary Evidence, and
 - a. Exhibit "A"
 - b. Exhibit "B"
 - c. Exhibit "C"
 - d. Exhibit "D"
3. Order to Show Cause.

4. Answer to Application, and
 - a. Exhibit 1
5. Affidavit of George Detweiler.
6. Request by Respondent to File Supplementary Affidavit.
7. Supplemental Affidavit of George Detweiler.
8. Order Granting Permission to File Supplemental Affidavit of George Detweiler.
9. Petitioner's Request for Permission to File Supplemental Affidavit.
10. Order Granting Petitioner Permission to File Supplemental Affidavit.
11. Affidavit of Howard E. Hilbun.
12. Respondent's Request for Permission to File Second Supplemental Affidavit of George Detweiler.
13. Order granting Respondent's Request for Permission to File Second Supplemental Affidavit of George Detweiler.
14. Second Supplemental Affidavit of George Detweiler.
15. Opinion of District Court. [52]
16. Order.
17. Notice of Appeal.
18. Motion for Supersedeas.
19. Order Granting Supersedeas.
20. Supersedeas Bond.
21. Designation of Record.

Dated this 23rd day of January, 1945.

Respectfully submitted,

PARRY & THOMAN

R. P. PARRY

J. P. THOMAN

Attorneys for Respondent & Appellant, Detweiler
Bros. Inc. Residence: Twin Falls, Idaho.

[Endorsed] Filed Jan. 25, 1945. [53]

[Title of District Court and Cause.]

CERTIFICATE OF COUNSEL

I, R. P. Parry, one of the attorneys for Respondent and Appellant in the above-entitled action, hereby certify that on the 26th day of January, 1945, I served the attached Designation of Record upon Douglas B. Maggs, Solicitor for Petitioner, Archibald Cox, Associate Solicitor for Petitioner, Dorothy M. Williams, Regional Attorney for Petitioner, Karl M. Rodman, Attorney for Petitioner, Charles H. Elrey, Branch Manager, Wage Hour Division, and Howard E. Hilbun, Sr. Inspector-in-Charge, Wage Hour Division, and each of them, by depositing a copy in the United States mails, postpaid, addressed to said Douglas B. Maggs, Archibald Cox, Dorothy M. Williams, Karl M. Rodman, and Charles H. Elrey, at 208 U. S. Court House, Old, c/o Wage and Hour Division, U. S. Department of Labor, Portland, 4, Oregon, and addressed to Howard E. Hilbun at 402 Federal

Building, c/o Wage and Hour Division, Boise, Idaho.

Dated: January 26, 1945.

R. P. PARRY

R. P. Parry, one of the attorneys for Respondent and Appellant.

(Copy of Designation of Record attached.)

[Endorsed]: Filed Jan. 29, 1945. [54]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK OF UNITED
STATES DISTRICT COURT TO TRAN-
SCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 54, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United

States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$18.35, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 12th day of February, 1945.

[Seal]

ED. M. BRYAN

Clerk. [55]

[Endorsed]: No. 10988. United States Circuit Court of Appeals for the Ninth Circuit. Detweiler Bros., Inc., a corporation, Appellant, vs. L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Filed February 14, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10988

L. METCALFE WALLING, ADMINISTRATOR
OF THE WAGE AND HOUR DIVISION,
UNITED STATES DEPARTMENT OF
LABOR,

Petitioner and Appellee,

vs.

DETWEILER BROS., INC., a corporation,
Respondent and Appellant.

STATEMENT OF POINTS AND DESIG-
NATION OF RECORD

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The Court erred in entering its order herein appealed from directing appellant to obey a subpoena duces tecum issued to it by appellee, for the reason that Appellant's establishment is one that is exempt as a retail service establishment within the meaning of the Fair Labor Standards Act.

2. The Court erred in entering its order herein appealed from directing appellant to obey a subpoena duces tecum issued to it by appellee, for the reason that Appellant is not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act, and is therefore exempt from the operation of the Fair Labor Standards Act.

3. The Court erred in entering its order herein appealed from directing appellant to obey a subpoena duces tecum issued to it by appellee, for the reason that the appellee, the Administrator of the Wage and Hour Division, did not show either (a) that appellant is not exempt as a retail service establishment within the meaning of the Fair Labor Standards Act, or (b) that appellant is engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act.

4. The Court erred in holding that appellee, the Administrator of the Wage and Hour Division, "has the absolute right to examine the books and records in question so that it can be determined whether there is a violation of the Fair Labor Standards Act", and that "the only purpose of the hearing", wherein appellant was ordered to show cause why the subpoena duces tecum sought by appellee should not issue "is to obtain an order, the disobedience of which would place the respondent in contempt of this Court's Authority", for the reason

(a) that it violates the constitutional limitation on search and seizure (Fourth Amendment to U. S. Constitution), and

(b) relegates the Courts of the United States to subordinate agencies of administrative bureaus, and

(c) deprives the Courts of the United States from exercising any discretion at all in the premises, and

(d) is contrary to law, in that it is not provided in the Fair Labor Standards Act, and Congress never intended that the private papers and effects of *all* citizens and corporations of the United States should be subject to examination and inspection of the Administrator of the Wage and Hour Division.

DESIGNATION OF RECORD

Appellant hereby designates the entire record on appeal to the Circuit Court of Appeals of the Ninth Circuit to be printed as certified by the Clerk of the United States District Court for the District of Idaho, Southern Division, and appellant also hereby designates this Statement of Points and Designation of Record to be printed.

Dated February 16, 1945.

Respectfully submitted,

PARRY & THOMAN

R. P. PARRY

J. P. THOMON

Attorneys for Respondent & Appellant, Detweiler Bros., Inc. Residence: Twin Falls, Idaho.

(Affidavit of Service Attached.)

[Endorsed]: Filed Feb. 19, 1945. Paul P. O'Brien, Clerk.

No. 10988

United States
Circuit Court of Appeals
For the Ninth Circuit

DETWEILER BROS., INC., a Corporation,
Appellant,

vs.

L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor,
Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States
for the District of Idaho
Southern Division

HON. CHASE A. CLARK, District Judge

R. P. PARRY
J. R. KEENAN

GRAYDON W. SMITH

Attorneys for Appellant, of Twin Falls, Idaho

DOUGLAS B. MAGGS, Solicitor

ARCHIBALD COX, Associate Solicitor

DOROTHY M. WILLIAMS, Regional Attorney

EARL M. RODMAN, Attorney

CHARLES H. ELREY, Branch Manager,

All for Appellee, 208 U. S. Court House, U. S. Dep't.
of Labor, Portland, Oregon

E. H. CASTERLIN, Attorney

HOWARD E. HILBURN, Sr., Inspector-in-charge,

All for Appellee, Federal Building, Boise, Idaho.

FILED

Filed, 1945

MAY 1 - 1945

....., Clerk

PAUL P. O'BRIEN,
CLERK

No. 10988

United States
Circuit Court of Appeals
For the Ninth Circuit

DETWEILER BROS., INC., a Corporation,
Appellant,
vs.

L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor,
Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States
for the District of Idaho
Southern Division

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FEDERAL JURISDICTION

That jurisdiction to determine the instant controversy lies properly in the Federal Courts is not denied by either party. Jurisdictional foundation for this case was laid thus:

(a) July 17, 1944, Appellee, Administrator of Wage and Hour Division of the U. S. Department of Labor, issued a Subpoena Duces Tecum to Appellant requiring Appellant to appear before certain officers of the Appellee at the Rogerson Hotel, Twin Falls, Idaho, and there testify, and to there produce certain documentary evidence allegedly "involving an investigation pursuant to the provisions of Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, of complaints of violations by the said Corporation of Sections 7 (a), 11 (c), 15 (a) (1), 15 (a) (2) and 15 (a) (5), of the said Act." (p. 23).

(b) Appellant refused to and did not appear as so requested and ordered to do. (p. 35, 6).

(c) October 6, 1944, Appellee applied to the United States District Court for the District of Idaho, Southern Division, for an order compelling Appellant to comply with said Subpoena Duces Tecum. (p. 2). The statutes which authorized Appellee to so apply, and which conferred jurisdiction upon the said Federal District Court of Idaho, Southern Division, are: Fair Labor Standards Act of 1938 (c) 676, 52 Stat. 1069; 29 U.S.C.A. Section 201 et seq.

(d) December 29, 1944, the Federal Court ren-

dered its decision ordering Appellant to comply with said Subpoena Duces Tecum (p. 46) and January 16, 1945, an Order was duly filed directing Appellant to comply with said Subpoena. (p. 49).

(e) January 16, 1945, Appellant filed Notice of Appeal from said Order of Compliance. Authority for this Circuit Court of Appeals to entertain this Appeal is Section 128 (a) of the Judicial Code, as amended February 13, 1925, effective May 13, 1925, 43 Stat. 936, 28 U.S.C.A. sec. 225.

Statement of the Case

The Fair Labor Standards Act, the one involved in this action, by its own terms, exempts retail service establishments, the greater part of whose business is intra-state commerce (29 U.S.C.A. Sec. 213, p. 509).

The only question involved in the instant proceedings is: Does the Administrator of this act *have the right* to take control of, inspect, and examine the books and records *of any and all businesses*, regardless of whether they are exempt from the act or not?

The instant proceedings arose in this way: Certain inspectors working under the Administrator of the act, came to the store of Appellant, Detweiler Brothers, in Twin Falls and demanded the right to go through all of their books and records. The owners of the store refused them permission to do so, claiming that they were exempt from the pro-

visions of the act. There then ensued lengthy negotiations, with the owners of the establishment remaining adamant. The Administrator then issued a Subpoena Duces Tecum (Exhibit E to the application herein) which, in broad and sweeping language, required Appellant to produce a great volume of books, papers and records in the public lobby of the Rogerson Hotel at a specified time. Appellant's attorneys, both by prior letter and by appearance at the hotel advised the Administrator's representatives that they would refuse to obey this Subpoena because in their opinion, the Appellant was exempt from the terms of the act.

Appellee thereupon made application to the Federal Court for the District of Idaho, Southern Division, for an Order directing and requiring Appellant to comply with the Subpoena Duces Tecum. October 6, 1944, the Court issued an Order to Show Cause ordering Appellant to appear before it upon a date certain at Pocatello, Idaho, and show the Court why an order directing compliance with the Subpoena Duces Tecum should not issue. Hearing was duly had on the Order to Show Cause, Appellee supporting his Application and position with Affidavits (ps. 9, 15, 20, 21, 42) and letters (ps. 12, 14, 18), and Appellant supporting its Answer to said Application with counter-Affidavits (ps. 36, 39, 44) and one letter (p. 34).

Appellee's Affidavits, as found by the Court (p. 47), were based upon information and belief. Ap-

pellant's Affidavits were statements of fact (p. 47). Appellant, in response to the Order to Show Cause, sought to show that it was not within the purview of the Fair Labor Standards Act, and therefore did not have to obey the Subpoena Duces Tecum, contending that it was exempt as a retail service establishment within the meaning of the Fair Labor Standards Act; that it was not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act; that before the Appellee could obtain enforcement of his Subpoena it must be shown that Appellant was not exempt from the operation of the Fair Labor Standards Act; and that not to require the Appellee to show that Appellant was subject to the Act, would (1) be a violation of the constitutional limitation on search and seizure; (2) relegate the Courts of the United States to subordinate agencies of administrative bureaus; (3) deprive the Court of its inherent and inalienable right to exercise its discretion in the premises; and (4) be contrary to law in that it is not provided in the Fair Labor Standards Act, and Congress never intended that the private papers and effects of all citizens and corporations of the United States should be subject to examination and inspection of the Administrator of the Wage and Hour Division.

Appellee, on the other hand, has always contended that he had the absolute right to investigate any person, corporation or business in the United States

simply by alleging, upon information and belief, that such person, corporation, or business was within the Act.

December 29, 1944, the Court rendered its opinion (p. 46), stating that the weight of the Affidavits was in favor of Appellant, but that the Court had no discretion in the matter, and no alternative but to obey the voice of the Administrator because "the only purpose of the hearing before this Court is to obtain an order, the disobedience of which would place the respondent in contempt of this Court's authority, and it is the conclusion of this Court that such an order should issue," (p. 49), and an order in accordance therewith was duly entered and filed.

This appeal is from that Order.

Assignments of Error

The Court erred in entering its order herein appealed from, for the following reasons:

I

Appellant's establishment is exempt as a retail service establishment within the meaning of the Fair Labor Standards Act. (See Point 1, p. 60, Transcript of Record).

II

Appellant is not engaged in commerce or in the production of goods for commerce within the meaning of the Act, and is therefore exempt from its oper-

ation. (See Point 2, p. 60, Transcript of Record).

III

Appellee failed to show appellant was not exempt as a retail service establishment or engaged in commerce or in the production of goods for commerce within the meaning of the Act. (See Point 3, p. 61, Transcript of Record).

IV

The order and decision herein appealed from violate Appellant's constitutional right to freedom of search and seizure, relegate the Federal Courts to subordinate agencies of administrative bureaus, prevent the Federal Courts from exercising any discretion at all in the premises, and are contrary to law in that it is not provided for in the Fair Labor Standards Act. (See Point 4, p. 61, Transcript of Record).

ARGUMENT

The District Court decided two things. First, that the weight of the evidence was in favor of Appellant, i. e., that Appellant was not subject to the Act. Second, that the Appellee, the Administrator of the Wage and Hour Act had an absolute right to the enforcement of the Subpoena Duces Tecum, and that whether or not Appellant was within the Act was a question the Federal Court could not entertain.

Has the Administrator the absolute right to inspect any and all establishments?

We all know of the constitutional limitation on

search and seizure as expressed in the Fourth Amendment reading as follows:

“Unreasonable searches and seizures — The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

If we follow the position of the Administrator and the District Court, then, the Fair Labor Standards Act is above and beyond this constitutional limitation. We question their interpretation of the act, for we find in Section 11 (a), the following:

“The Administrator or his designated representative may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to sections 201-219 of this title, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of sections 201-219 of this title . . .”

The italic phrase of the above section 11 (a) obviously meant something. It meant that only

industries subject to the Act could be investigated. The latter portion of that section provides that the Administrator may enter and inspect places subject to the Act, and their records, question their employees and so forth in order to determine if any violations of the Act have occurred.

Section 11 (c) of the Act provides:

“Every employer *subject to any provision of sections 201-219 of this title* or of any order issued under sections of this title shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate *for the enforcement of the provisions of section 201-219 of this title* or the regulations or orders thereunder.”

Obviously, the italic language in the above section also meant something. It meant what it said; that only employers subject to the Act need make, keep and preserve such records, and so forth as therein set out.

General Tobacco & Grocery Co. v. Fleming, (1942; CCA 6th) 125 F.2d 596, is summarized thus in Volume 2, Wage and Hour Cases:

“Administrator does not have visitatorial and

inquisitorial power over all industry to determine whether any person has violated Act without a prior court hearing upon the issue of jurisdiction since such authority would extend the power of Administrator beyond the apparent intention of Congress and invade the constitutional immunity from unreasonable search and seizure."

A more detailed quotation, giving the gist of that case, is set forth in Appendix No. 1, page 40, of this brief.

In *Application of Walling*, (1943) Dist. Ct. N. J., 49 F. Supp. 659, it was also held that the Administrator in seeking to enforce a Subpoena Duces Tecum must show that the industry is within the Act. That Court said:

"... the Administrator insists that the issuance of the Subpoena is in nowise dependent on proof of coverage and that under the broad provisions of section 11 (a) he has power not only to investigate and gather data concerning pertinent matters in any industry subject to this Act, but that he may also issue administrative subpoenas and secure enforcement of them in this Court regardless of the question of coverage, since that issue is not a jurisdictional fact to be determined by the Court before such enforcement, but is initially for the Administrator

to determine as a fact, binding on the Court.

“Reliance is had in large part by the Administrator on the cases of *Perkins v. Endicott Johnson Corp.*, 2 Cir. 128 F.2d 208, affirmed by the United States Supreme Court in an opinion recently handed down by Mr. Justice Jackson, 63 S. Ct. 339, 87 L. Ed., and upon *Holland v. Standard Dredging Corp. D. C.*, 44 F. Supp. 601.”

The Court then distinguished the Endicott case by pointing out that there the employer by choice came under the jurisdiction of the Walsh-Healy Public Contracts, and that in accordance with that Act, upon complaint an investigation was had. The court said that case was governed by the Walsh-Healy Public Contracts Act, “*which differs specifically from the Fair Labor Standards Act of 1938.*” And then the court said:

“In the instant case, the Administrator without complaint and simply in quest of information upon which to base proceedings, should they be justified, issued his subpoena directing the production of certain records, the examination of which might or might not disclose a violation. The suggestion has been made that to deny enforcement of a subpoena such as the one issued in the instant case would be to divide proceedings into two distinct stages—one concerning the presence of ‘Commerce,’ and the other to

determine other elements of violation of the law.

“There would seem to be no compelling reason why such should not be the case, for if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the Act should not be applied thereto; and to the objection that this course of procedure would lead to unwarranted delay in the carrying out of the Act, it would seem reasonable to suggest that only in cases where doubt could exist, would such question as has been raised herein be the basis of objection, and should frivolous claims be made they could very easily be determined by the Court at the time of application for an order enforcing the terms of the subpoena.”

The court also stated that in the Endicott case, “nowhere in the course of the opinion is there any rejection, specific or by patent implication, of the findings of the latter court as set forth in *General Tobacco & Grocery Company v. Fleming*,” *supra*, which we have already discussed and which holds that Administrator must show employer is within Act. The court also said:

“The trend and tendency of the present day is to enlarge the functions of administrative bodies in order to carry out the purposes of social legislation. Commendable as this is, the functions of the Courts remain, and those

functions are not merely to act as an adjunct of administrative bodies, but rather in such instances as have been categorically indicated by Congress to implement the operation of such bodies. Desirable as the contribution of experts to government is, there is no indication that Congress has as yet determined to substitute a government of mere expert opinion, for a government of law.

Court concluded Administrator must show employer was covered by Act.

In *Walling v. Benson*, 137 F.2d 501, (CCA 8th), it was held that the Administrator must present to the Court sufficient grounds to convince the Court that one sought to be investigated was probably within the Act. We respectfully call the Court's attention to the pertinent quotation from that case set forth in Appendix No. 2, page 42 of this brief.

Certainly, no Court should go further than did that Court, which held that it was at least necessary for the Administrator to show that he had reasonable cause to believe that a given business was subject to the act before he was entitled to inspect its records. In this case with a mere statement on information and belief by the Administrator on the one hand, and the explicit statements in the Appellant's affidavits on the other hand, there is no showing of any "reasonable ground to believe" that this establishment is subject to the act, and consequently, under

the above holding, no ground to order the issuance of a subpoena.

We find one other case which seems to hold specifically that the Administrator, upon an information and belief application has not made a sufficient showing. The case is again only available to us in the Wage and Hour Cases, but there we find the following:

“In proceeding to enforce administrative subpoena duces tecum, wherein the answer denies that Administrator has cause to believe that employer violated Act, the Administrator has burden of showing probable cause.”

(U.S.D.C. Miss., 1942; *Walling v. Miss. Road Supply Co.*) 2 Wage and Hour Cases, p. 1213.

We know that the question here under consideration, whether the Federal Court must obey when the Administrator says the magical words, is unsettled. In the Ninth Circuit, there is no decision on this question. Some of the cases which appear on their face to be contrary to the ones hereinbefore discussed, are not actually contrary. In some of them, the employer, or industry sought to be investigated, admitted it was doing some interstate business, or that part of its business was not a retail, service establishment within the exemption of the Act, and that part of it was. Some of them were decided under the Walsh-Healy Act, which applies only to those contracting with the Government.

For example, in *Martin Typewriter Co. v. Walling*, 135 F.2d 918, CCA 1, the showing of the employer in that case was decidedly different than the showing of Appellant here. There, the employer admitted that it sold and serviced in interstate business, by alleging "it was a 'retail and servicing establishment, the greater part of whose selling and servicing is in interstate commerce.' " Here, Appellant denies that it does any selling or servicing in interstate business. In *Cudahy Packing Co. v. Fleming*, 119 F.2d 209, before a subpoena of enforcement was issued, an extended hearing was had. The lone syllabus of that case reads:

"The Administrator of the Wage and Hour Division had authority to issue subpoena duces tecum under Fair Labor Standards Act of 1938 to require employer to produce documents relating to wages paid employees and hours worked by them during certain period, and the federal District Court had jurisdiction to enforce the subpoena."

Miss. Road Supply Co. v. Walling, 136 F.2d 391, CCA 5th, very definitely states that issuing an order enforcing a subpoena is within the discretion of the Federal Court. In fact, it states, citing in support thereof, the United States Supreme Court decision, *Jones v. Securities and Exchange Com.*, 298 U. S. 1, 56 S. Ct. 654, 80 L. Ed. 1015, the rule as follows:

"When called on for assistance under Sect. 9

of the Act, which adopts the provisions of Federal Trade Commission Act, 15 U.S.C.A., sec. 49, 'any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy, or refusal to obey a subpoena . . . issue an order . . .' The language is not mandatory, but permissive. If on the face of things a lawful enquiry is in progress, the court ought to assist it, assuming that the enquiring body will confine itself to its lawful functions. *Bradley Lumber Co. v. N.L.R.B.*, 5 Cir. 84 F.2d 97. The burden indeed of showing that the inquiry is lawful is upon him who is called on to show cause why a subpoena should not be obeyed. The presumption of regularity of the proceedings of public officers so places the burden, unless on the face of the proceedings they are unlawful or oppressive. *But if it is made to appear that the investigation is clearly without just authority, as that the person investigated is clearly not under the Act and that grave inconvenience or injury may result, the Court may very properly decline to assist.*" (Emphasis ours.)

The Court went on to say that from a preliminary hearing, it appeared that some of the employees were probably engaged in interstate commerce, and that there was doubt as to "whether the Company was a retail and service establishment."

The case of *Fleming v. Montgomery Ward & Co.*, 114 F.2d 384, CCA 7th, is decidedly different than

this one. There the Company admitted it was engaged in interstate commerce, but opposed the subpoena on the ground it was unreasonable search and seizure, and that the Administrator must show reasonable grounds to believe a violation of the Act had occurred, and that immunity against self-incrimination protected the Company from search and seizure. The court held that since the Company was admittedly subject to the Act, that the Administrator did not have to prove reasonable ground to believe a violation of the Act had occurred; that it was not unreasonable search and seizure; and that since the Company was a corporation it was not, as such, protected by immunity against self-incrimination which is guaranteed by the Fifth Amendment.

Also distinguishable is the case of Cudahy Pkg. Co. v. Fleming, 122 F.2d 1005. There, the Company admitted

“that it is engaged in interstate commerce at its Newport plant, but contends that the business of the St. Paul plant is intrastate only.”

The Company however in refusing compliance with the subpoena insisted it need only turn over records pertaining to employees “concerning whom complaint had been made.” The court there held that where it was admitted that part of the employees were subject to the Act and part were not that the Administrator had the right to investigate to determine which employees were engaged in interstate

commerce and which were not. However, the Court frowned upon "fishing expeditions" by saying:

"All the records required by the subpoena here involved were for a reasonable period (being from Oct. 24, 1938, to Nov. 16, 1940), under the circumstances of the case, and were relevant to a legitimate field of inquiry under the Act. There was no attempt to conduct a general fishing expedition such as was condemned in *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298, 44 S. Ct. 336, 69 L. Ed. 696, 32 A.L.R. 786."

The first sentence of the opinion in *Walling v. American Rolbal Corporation*, 135 F.2d 1003, is:

"The appellant is a corporation engaged in the manufacture of ball and roller precision bearings and is admittedly subject to the provisions of the Fair Labor Standards Act of 1938."

Clearly, it is not precedent for the case at bar.

Do the United States Courts have any voice in determining whether or not the Administrator of the Wage and Hour Division is entitled to enforcement of a Subpoena Duces Tecum in this case, or in any case? The opinion herein appealed from, without giving reasons therefor other than saying the *Endicott Johnson* case is controlling, holds that the Administrator has an absolute right to enforcement of his Subpoena Duces Tecum. The opinion holds to that effect after stating that the weight of the evi-

dence is to the effect that appellant is not subject to the Act.

We have read, we believe, all the cases available to us on this particular point. Not one of the cases which seems to hold, or which indicates, that the Administrator has the Absolute Right to enforcement of his Subpoena Duces Tecum, without first showing that the one to be investigated is within the Act, contends that the pertinent statutes give that right to the Administrator in express terms or in plain, simple language. In each case, the court has, as baseball players say "had to reach for that one," in order to support its interpretation of the pertinent statutes with seeming logic. One reading of the statutes and those cases wherein the "give-it-up" philosophy* has been applied, shows how far these Courts have strayed from their once stalwart position. The opinion of the District Court herein appealed from is a perfect example of the trend of the judiciary to give up its responsibility.

In early English history, as we all know, the King was Supreme. Then came Magna Charta and with it a new vista, a new horizon. Still, the King ruled and the English Courts did not really achieve the independence which has so differentiated government and life in England and America from that of continental Europe and other countries of the world, until long after that famous Sunday, November 10, 1607, when Sir Edward Coke, in Prohibition

*Am. Bar Ass'n. Journal, Sept. 1944, p. 501.

Del Roy, 12 Coke's Reports 63, stated: "Rex non debet esse sub homine, sed sub Deo at Lege" (The King ought not to be under man, but under God and the Law.) However, the English Courts had to fight constantly to preserve their freedom of judgment and action, and they learned through bitter experience that liberty was the price of ever constant vigilance and judicial courage. As stated by John Dickinson, *Administrative Justice and the Supremacy of Law*, p. 94 et seq:

"So long as judges were mere officers of the King, law could operate only intermittently as an agency to control the King. Hence the long struggle in England, throughout the century following Coke's death, to secure the independence of the judiciary, and hence the ingrained notion which we have inherited, that it is wrong for judges to be governmental officers . . . In the United States Coke's doctrine has been what we built upon."

And so one of the fundamental elements of our government, built with a purpose into our Constitution by the founders of this country, was the independent and separate judiciary. Its Bible was the written Constitution which was to be the Supreme law of the land. The traditional common-law jealousy of administration, developed in the contests between the courts and the Stuart Kings, which we inherited from the English, was "kept alive by the distrust of administration in pioneer societies" and

unfortunately it "took form in an over-narrow analytical conception of the separation of powers which proved unworkable in the transition from a rural agricultural to an urban industrial society." (Am. Bar Ass'n. Journal, March, 1944, p. 121).

From this one extreme, of a judiciary which was over-technical and super-cautious in protection of the fundamental freedoms of the individual, the pendulum has swung with the times to the far side of its arc. As stated by Joseph B. Eastman, Chairman of the Interstate Commerce Commission and Director of the Office of Defense Transportation:

"The Courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction." (Am. Bar Ass'n. Journal, May, 1944, p. 266).

Roscoe Pound, Am. Bar Ass'n. Journal, September, 1944, p. 501, said:

"The rise of administrative agencies, claiming and to some extent enjoying immunity from judicial review of their action, has been introducing the Roman type of public law into our system and there are teachers of laws and of politics who assert that it is 'gradually eating up' the private law which secures the individual rights of the citizen."

Now, the particular interest of the particular indi-

vidual is of no consequence. All we need worry about is the over-all purpose which is labelled "good"; it matter not who be injured by the wayside.

Administrative agencies, a necessary and concomitant part of social legislation and reforms, have mushroomed to unheard of and unbelievable proportions. Their very numbers and size seem to have over-awed some of our Courts. Some Courts no longer feel free to exercise an independent opinion, and render decisions based not upon their own thoughts or convictions, but act upon direction of administrative officers of the executive branch of the government. They have become, in fact, "officers of the King."

The subjugation of the judiciary by the Executive branch of a government has always been considered, in so-called democratic or free countries, the darkest blot of all. As stated by the Honorable George W. Maxey, Chief Justice, Supreme Court of Pennsylvania:

"The third 'indispensable' to equilibrium between liberty and government is an independent judiciary. Its function is to determine between individuals and between the individual and the government what is justice under the law, and to keep every governmental department and official within their constitutionally assigned spheres. Such a judiciary maintains the equilibrium between liberty and government. Servile judges mean an enslaved people. Ten years

ago Adolph Hitler declared himself the depository of all judicial power in Germany. Napoleon III in his march to absolutism in France reduced French judges to abjection. Victor Hugo described them as follows: 'What a spectacle is that flock of judges, with drooping head and bended back, driven at the butt-end of a musket to the perpetration of every infamy and every crime!' The finest fruitage of the English Revolution of 1688 were independent tribunals of justice. A major charge against George III, in the Declaration of Independence, was that he had 'made judges dependent on his will.'

"All history proves that liberty endures only under law." (Am. Bar Ass'n. Journal, Feb. 1944, p. 65).

The subjugation of the judiciary in our country is being brought about through the gradual encroachment of administrative agencies upon heretofore virgin rights, kept ever pure by the core of America, the Independent Judiciary. Now, the administrative agencies and bureaus not only administer but legislate. As said by Hatton W. Summers in Readers' Digest for September, 1943: "One bureaucrat in the Securities and Exchange Commission said recently: 'We do make the law. This order supersedes any laws opposed to it.' Actually the bulk of what in effect are our general laws are now being made not by Congress but by bureaucracies." Worse than the fact that they legislate is that they usurp

the power of the Federal Court and make decisions without any semblance of a fair and impartial trial. As stated by Joseph W. Henderson, President, American Bar Association:

“ . . . There is a tendency of administrative agencies to decide without adequate hearing, or without hearing one of the parties, or to decide first and ‘make the record’ to support it later.

“In *Federal Communications Commission v. National Broadcasting Co.*, Supreme Court of The United States, May 17, 1943, 63 Sup. Ct. Rep. 1035, the government actually contended that where an order was made without a hearing against one entitled to a hearing, the latter could not appeal. This was properly rejected by the majority of the court. But the dissenting justices contended that to allow the appeal ‘imposed a hampering restriction upon the functioning of the administrative process.’ This suggests the justice of the peace who refused to hear evidence on behalf of the defendants because he found it hampered him in arriving at a judgment for the plaintiff.” (*Am. Bar Ass’n. Journal*, Dec. 1943, p. 681).

For a better understanding of the background of our Courts and the growth of administrative bureaus, the virtues and dangers of each, we respectfully call the Court’s attention to the articles mentioned in our authorities listed on pages 3 and 4.

This trend of administrative bureaus to tread more and more upon the rights of individuals has, we believe, reached a new high in the particular case at hand. Perhaps the most cherished essential of our judiciary system is the principle that we always hear the other side. Even the worst criminal is entitled to his day in court before judgment may be pronounced. So, we feel that it is really startling when we encounter a situation where the district court must issue to appellant an Order to Show Cause, and then after the Hearing on that order, the district court renders an opinion stating that appellant has no right to show cause; that appellant will not be heard. It seems to us a mockery of Justice that in America, a litigant must plead with the Courts TO BE HEARD.

This tendency of administrative agencies is well stated by Roscoe Pound in *The Challenge of the Administrative Process*, March, 1944, *Am. Bar Ass'n. Journal*, p. 123:

“On other occasions I have pointed out tendencies of administrative determination abundantly illustrated in the operation of our administrative agencies which are confirmed by the report on the OPA. Most serious among them is one going counter to what has always been the first principle of judicial justice, namely, *audi alteram partem*, hear the other side. In administrative adjudication there is an obstinate tendency to decide without a hearing,

or without hearing one of the parties or after conference with one of the parties in the absence of the other, whose interests are adversely affected, *or to treat the statutory requirement of a hearing as a mere formality and act upon pre-formed opinions as to the order to be made . . .* the apologists for administrative absolutism do not claim that it consists with our constitutions state and federal. But they say that we must look at these things 'Against a background of what we now expect the government to do,' and apparently in the administrative quest of social objectives it is considered that we do not expect the government or its agencies to treat the citizen fairly, even if we did when our constitutions were framed. We are told that the separation of powers antedates the rise of administrative attainment of social purposes and must not be suffered to stand in the way."

Absolute power reposed anywhere in anyone is bad enough but when it raises its ugly head camouflaged under the banner of social reform and advancement it is most dangerous.

In reading the decisions, which apparently the District Court relied upon, we find that they say that there is a safeguard which protects appellant's constitutional rights. It is this: After the Administrator investigates appellant and if appellant is violating some provision of the Act, the appellant will be given an opportunity to cease and correct the

violations. If appellant does not so cease and correct the violations, the Administrator will seek an injunction from the Court, and in this proceeding both coverage and violations will be adjudicated.

Thus, it is said, the one investigated eventually gets his day in court and a judicial determination as to whether or not he is within the Act. But let us stop and consider how an employer who is not within the Act may gain an adjudication upon that point. He must first violate some provision of the Act. Then, when complaint is filed against him accusing him of being guilty of a criminal offense and of refusing to cease committing said criminal offense, he may, it is said, get an adjudication upon coverage as well as upon the violation. In other words, the only way an employer may BE HEARD upon this very important point is when he is hailed before the Court as an offender. We seriously doubt if any one of the Courts which has held that the Administrator has an absolute right to enforcement of his Subpoena Duces Tecum, has been aware of the burden this arbitrary ruling will have upon hundreds of thousands of employers in this country. Have they considered all the regulations with which each employer must comply to keep on the good side of Heaven and the Administrator? Let us look at just a small part of one section of several sections composing the Rules and Regulations implementing the Fair Labor Standards Act, so that the court will have at least a preliminary look at the red tape and added over-

head thrust upon employers who are not within the Act.

Sec. 516, of Title 29 U.S.C.A. p. 581, being only a part of the Rules and Regulations implementing the Fair Labor Standards Act, provides the records that employers subject to the Act must keep. These regulations might change the particular employer's whole general set-up and scheme of organization. Under this section, it is provided that for employees subject to minimum wage and 40-hour week overtime provisions, a certain type of records must be kept (sec. 516.2) ; that for employees under certain union agreements who are to be paid for overtime over 12 hours a day or 56 hours a week, a certain type of record must be kept (sec. 516.3) ; that copies of certain agreements with labor representatives must be forwarded to Washington, D. C., and filed with the Administrator in a particularly way (sec. 516.3-b) ; that a particular record shall be kept for employees hired pursuant to the above-mentioned labor agreement (sec 516.3-c) ; that for bona fide executive, administrative, professional, local retail, and outside sales employees certain particular records must be kept. A statement from the report of the Committee of the Bar Association of San Francisco on Administrative Hearings of the Office of Price Administration, seems to fit in here:

“It seems to be a characteristic of some of the recently established administrative agencies

to assume that ordinary citizens have nothing to do but to fill out questionnaires and otherwise serve in attendance upon the multifarious demands of the administrative agencies." (Am. Bar Ass'n. Journal, March, 1944, p. 123).

These regulations are voluminous and we wish the court would please examine them, in order to understand the magnitude of the problem facing individual employers, who honestly feel they are not subject to the Act, but who dread the imposition of the severe penalties, contained in sec. 216 of the Act. It is all very well to say that the Administrator will be fair with offenders and give them time to get in line, but American business has made this country strong by operating on a sound basis within the law. The good business man who wants to stay in business must know what he can do before he does it. It is essential to progress that the business man who feels he is not within the Act and who can not afford to be burdened with keeping records and complying with all the other thousands of regulations which those within the Act must necessarily keep, be given an early adjudication on the question of coverage. There is nothing secret about appellant's business. It would take no great amount of time and effort for this question of coverage to be decided and settled.

We feel that the Federal Court still maintains its dignity; that it has not become a mere rubber stamp, to be used, not as an arbiter or a medium of Justice, but as a sort of a filling station of POWER, where

the Administrator has the ABSOLUTE RIGHT to extract a weapon placing that forgotten man, the United States Individual Citizen in a straightjacket; empowering the Administrator to probe him, investigate him, analyze him, diagnose him and then operate upon him, for, let us say acute appendicitis. If it turns out that there is no acute appendicitis, there is no harm done. IT IS ALL IN THE INTEREST OF EXPEDIENCY OF ADMINISTRATION. Of course, the X-ray would have revealed that there was no acute appendicitis, just as a hearing upon the question of coverage would have revealed whether appellant was actually within the Act. The Administrator, however, does not care for this logical way of first finding whether an employer is within the Act, and then proceeding to investigate; but insists he be allowed to investigate and then prosecute, leaving the little matter of whether he has any right at all to harass the particular employer to be taken up at some indefinite time in the future.

The foregoing cases, especially when viewed in connection with their historical background, establish conclusively that the Federal Court should, and must, decide this question of coverage in a proceeding of this kind.

The opinion and order herein appealed from go a step further than any other case we have found. Here there is a statement by the Court that on the facts the appellant does not appear to be within the Act. Then, the Court concludes, *in the face of this*

factual finding, that it must enforce the Administrator's Subpoena Duces Tecum. We feel very deeply over this ruling of the District Court. It brings every activity in the whole country within the investigatory power of the Administrator. It seems to us a complete abdication, by the Court, of its constitutional role of guardian of civil rights and liberties. In no other reported case, that we have found, has the constitutional immunity from search and seizure been swept into the fire without some factual justification.

The decision of the District Court must be reversed for the reason that it is without any factual support and is contrary to the law.

IS THE RESPONDENT AN EXEMPT ESTABLISHMENT?

The court found:

"On the date of the hearing on the order to show cause, the respondent filed a positive affidavit and later filed a supplemental affidavit, positively stating that they are a retail establishment and not within the Act, doing business solely within the State of Idaho. The affidavit of the administrator is on information and belief. The weight of the affidavits are in favor of the respondent as its affidavits are positive and the affidavit of the Administrator, as hereinbefore stated, is on information and belief." (p. 47).

There being no appeal by appellee (the Administrator), or any assignments of error, that finding of the District Court cannot be disputed here, and it stands undisputed that, on the facts, Appellant's establishment is a retail establishment, doing business solely within the State of Idaho.

The Applicable Law

With the facts established in this way, the weight of authority is clear that an establishment such as appellant's is within the exemption set out in Section 213 of the Fair Labor Standards Act, which is as follows:

“The provisions of sections 206 and 207 of this title shall not apply with respect * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce . . .”

This Ninth Circuit Court has taken a very broad view as to what is included in the definition of a retail service establishment. In *Walling v. Block*, 139 F. 2d 268, there was presented a situation wherein a concern operating a chain of nineteen retail shoe stores, fourteen in Washington, three in Oregon and two in Idaho, maintained a central office and warehouse in Seattle where the merchandise was received from out state and redisbursed to the stores, and wherein all accounting, buying, advertising and managing was done. The question involved was

whether or not the employees at Seattle were included within the act.

Judge Bowen of the Western District of Washington held that they were not; that this was all a part of a retail service establishment as contemplated by the act. Upon appeal, the Ninth Circuit Court, in an opinion written by Judge Healy, affirmed the lower court's decision, stating in part:

“It appears to us that the work of the employees in the present case is plainly incidental to the operation of a retail business. While in some respects the functions performed at the central warehouse are comparable with those performed by the traditional wholesaler, yet obviously the analogy is superficial and incomplete. Large retail department stores have central business offices and maintain warehouses or stock rooms where goods are received and from which they are distributed to the various departments. These may be in the same building as the selling departments or in a separate building. The mere physical separation of appellee's warehouse from the stores themselves can hardly be regarded as a controlling factor.”

Walling vs. Roland Elec. Co., 54 F. Supp. 733 held that an employer engaged in selling new and old electrical motors in intrastate commerce, repairing and reconditioning used motors, and installing and re-

pairing private, commercial and industrial wiring systems was exempt from Fair Labor Standards Act because engaged in a 'retail or service establishment.'

Twyman vs. Milk Bottlers Federation, 47 N. Y. S. 2d 206, held that the business of milk bottlers federation was that of a 'service establishment,' and as such within exception of the Fair Labor Standards Act.

An owner and operator of four retail food stores in one city and another in a different state all of which were operated as a single business unit under one management, contended he was engaged in a retail, service establishment, within the exemption of the Fair Labor Standards Act; and that the greater part of his business was intrastate. In *Walling v. Wolferman, Inc.*, 54 F. Supp. 917, the court held that the owner was a retailer and not covered by the Act. Please turn to the quotation from that case in appendix 3, page 45 of this brief.

Under the rule announced in the foregoing cases, there can be no question but that the appellant's establishment falls in the exempt classification.

CONCLUSION

In view of the foregoing cases and the Court's holding that appellant's affidavits, to the effect that appellant's establishment is not within the Act, predominate over the appellee's affidavits, we respectfully submit that it must be considered that appellant's establishment is one that is exempt from the application of the Fair Labor Standards Act, and that, as such, under the best reasoned authority, the Administrator is not entitled to an order enforcing his subpoena.

If the Administrator is in the possession of any facts indicating that appellant's position is erroneous, the Court is open for him to allege, and at a proper hearing prove, those facts as a ground work for getting a subpoena. As the Court said in *In Application of Walling, N. J.*, 49 F. Supp. 659, quoted above, there is no compelling reason why the Administrator should not establish this ground work in a proper hearing.

To require the Administrator to follow such procedure is only just and reasonable and in line with American jurisprudence as we know it. To take the extreme position, that even though the Court finds that appellant is not within the contemplation of the Act, the Federal Court must enforce the Subpoena Duces Tecum of the Administrator so that he can go through the records of any and all businesses, in an effort to establish whether or not they are subject to

the act, does violence to all our precepts of justice and it seems to us, is in direct conflict with our Constitution.

We submit the decision of the District Court should be reversed and the order herein appealed from vacated.

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APPENDIX

NO. I

“The averment of appelle (Administrator), on information and belief that appellant was engaged in interstate commerce was not subsequently supported by the introduction of any evidence. Appellant’s answer, specifically denying any engagement in interstate commerce by appellant and its employees, described the conduct of its business as exclusively intrastate commerce. A fact question upon the jurisdictional issue of interstate commerce was thus tendered by the pleadings in the district court.

“But the court declined to try this issue . . .

“The Administrator contends, that, while in the first clause of the compound sentence of Section 11 (a) above quoted, the words ‘industry subject to this act (sections 201-219 of this tile)’ are used, there is no such limitation in the second clause of the sentence, and that, therefore, the Administrator has been accorded visitorial and inquisitorial power over all industry, to determine whether any person has violated any provision of the Act, or for the purpose of aiding the enforcement of the provisions of the Act.

“To adopt this strained construction would extend the sweep of his inquisitorial power beyond the apparent intention of Congress, as evidenced by the repeated limitations of the applicability of the Act,

to those subject to its provisions. It is unreasonable to assume that Congress intended that one who, when called upon to produce his books and records, denies that he is engaged in transactions within the purview of the Act should be refused a hearing upon that issue before his privacy is invaded in derogation of his individual immunity from unreasonable search of his papers and effects.

“In the exercise of the judicial power to review questions of law, as conferred by an act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency. Why, in the context, should any power of review whatever have been vested in the courts, unless Congress intended that such review should be judicially exercised?

“With characteristic forcefulness of expression, Mr. Justice Holmes said . . . ‘Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinates agencies to sweep all our traditions into the fire . . . and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime . . .

“On the issue of fact tendered by appellant’s answer, the Administrator must show that appellant is engaged in interstate commerce or in the production of goods for interstate commerce before he will be en-

titled to the relief prayed in his application. On the hearing of this issue, both appellant and appellee will be privileged to introduce evidence.”

NO. 2

“Does the Administrator of the Wage and Hour Division have an absolute right to a compliance order from the district court, for the enforcement of an investigatory subpoena duces tecum . . . without regard to whether the business involved actually is under the Act or whether reasonable ground exists for believing that it is subject to the Act?

“None of our previous decisions directly answers the question here. In *Cudahy Packing Co. v. Fleming*, 8 Cir. 122 F (2d) 1005, (reversed on another ground, sub nom. *Cudahy Packing Co. v. Holland*, 315 US 785, 62 S. Ct. 803, L. Ed. 1191) we held that where some phase of the general business conducted by an employer was admitted to be subject to the Fair Labor Standards Act, the Administrator, without further showing as to coverage, was entitled to a compliance order for the enforcement of a relevant and reasonable investigatory subpoena duces tecum for the business as a whole . . . We regarded the fact that part of the employer’s business was admittedly subject to the Act as a sufficient warrant for judicial aid in enforcing an investigatory subpoena duces tecum for the business as a whole, to enable the Administrator to determine the exact extent of the subject operations and employee-coverage in the entire

industry, including the relationships between the several plants.

“We have thus recognized that the question of actual coverage under the Act, as to particular employees, business-departments, or plant-units, in an industry sought to be investigated by the Administrator, is not a matter which the employer is entitled to have formally tried out and adjudicated in the district court on an application to enforce an investigatory subpoena, where reasonable ground appears to exist for making the investigation.

“. . . appellees attempt to distinguish that case from the present situation on the ground that there is no admission here that any part of the employer’s business is subject to the Act, nor has the Administrator alleged or offered to prove such is the fact.

“We think the principle applied by us in the Cudahy Packing Co. is controlling here, but its reaches do not extend as far as either the Administrator or appellees antithetically contend

“Thus, while it is our view that the employer is not entitled to a trial and adjudication of the question of coverage on the Administrator’s application to enforce an investigatory subpoena, and that the Administrator is not required to make proof of actual coverage as a basis for judicial aid in its enforcement, we believe that the district court, is entitled to the assurance that it is not giving judicial sanction and force to unwarranted or arbitrary action, but

that reasonable ground exists for making the investigation. Judicial enforcement necessarily is the exercise of judicial power, and judicial function can never wholly escape the test of judicial responsibility.

“The sound test of judicial responsibility is not, of course, its lavishness of concern, but its measured adherence to the actual need of, and its authority in, the situation with which it is required to deal. Over responsibility may be as much an abuse of judicial power and function as irresponsibility . . . and the courts must conscientiously guard against any instinct of over protectiveness, which may unwarrantedly and needlessly impede proper administrative effort or result . . . But . . . they must not sweep aside the fundamental and inherent concept that a judicial responsibility is owing for any judicial function that they are called upon to perform—a responsibility that necessarily must soundly cover (but not attempt to extend beyond) the scope of the required function.

“. . . if it was intended to be implied that the Administrator should have the power also to make an investigation, through subpoena, of every industry in the country, regardless of whether it had even a probable or apparent relationship to the Act, the statute would in our opinion be going beyond any previous implied grant of administrative authority. It would require more explicit and unmistakable language than is contained in the present Act to induce us to believe ‘that Congress intended to authorize one of its

subordinate agencies to sweep all our traditions into the fire.'

"To require the Administrator *to satisfy the district court* that he has reasonable ground to believe that the industry sought to be investigated is subject to the Act, as a basis for the issuance of a subpoena enforcement order, is not an impeding of sound investigatory effort. The obtaining of sufficient general information to indicate whether an industry is, in any aspect of its business, apparently and probably engaged in interstate commerce or in the production of goods for interstate commerce certainly does not itself depend upon the use of a subpoena power, for the general nature of a business cannot be that closely concealed. In any event, the law cannot sacrifice responsibility of action for mere ease in its performance."

NO. 3

"It is obvious that there might be a manufacturing process so closely related and incidental to a retailing business as that none would argue it was separate and distinct. Making ice cream is manufacturing. Ice cream is sold at the fountain in the corner drug store. Perhaps a boy is employed to turn an ice cream freezer in an anteroom. All the cream he makes is sold in the store. Is not that manufacturing incidental to and a part of the retailing business? Again, there is a little store where loaves of bread are sold at retail. One person attends at the counter and sells to customers. Another, in a back room, gives all her

time to baking bread to be sold. Is not that manufacturing purely incidental to the retailing? And would not the answers be the same if the soda fountain were a block long and the services of five boys turning freezers were required; if the demand for bread were so great that the services of five bakers manufacturing bread were required to meet it?

“Before we have read a single case cited by learned counsel it seems clear to us that manufacturing conducted by a retail merchant solely to serve his customers buying at retail over his counters, it seems to us that that manufacturing is incidental to the retailing. Whether the counter over which he sells is ten feet long or a block long. Whether the retailer has one store or two or five. Whether the incidental manufacturing is carried on in the basement of a store or in the attic or in some other convenient place. We are convinced, therefore, that the manufacturing carried on in defendant’s candy kitchen solely to provide candy for customers in defendant’s retail store is a manufacturing incidental to retailing and that, in the sense of the statute, the employees in the candy kitchen are employed in the retail establishment.

(Then follows an extensive discussion of the law) In talking about the conduct of the employer, the court said:

“It is impossible, however, to believe that this defendant has not acted throughout its controversy with plaintiff in good faith. It has believed it was

right in its interpretation of the law and we believe it was right. It was advised by outstanding counsel that it was right. Why should its president not have acted in accordance with his conscientious belief and the advice of counsel? *The American citizen is not required, like a trained animal in a circus, to jump through a hoop at every crack of the whip of an agency of the executive.* And as to whether a declaration of intention is to be accepted at face value or is to be rejected and disregarded, that depends upon the character of the man by whom the declaration of intention is made. The president of the defendant company impressed us on the witness stand as a man of integrity. We noted that he would not even say that he would not abide by the judgment of *this* court, but said, in effect, he would abide by the judgment of the highest court. That might not have been a diplomatic announcement to make, but it was consistent with the American character. His whole conduct and demeanor in court were those of an honest man, an impression corroborated by the agreed statement of facts which sets out that this man has so served the people of Kansas City for fifty years that his business has grown from one of trifling proportions to a great and successful enterprise. *The declaration of such an individual is not to be put in the same category with that of some fly-by-night. (Italics ours).*

No. 10988

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

DETWEILER BROS., INC., A CORPORATION, APPELLANT

v.

**L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, UNITED STATES DEPARTMENT
OF LABOR, APPELLEE**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION**

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE AND HOUR
DIVISION**

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**In the United States Circuit Court of Appeals
for the Ninth Circuit**

No. 10988

DETWEILER BROS., INC., A CORPORATION, APPELLANT

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION, UNITED STATES DEPARTMENT
OF LABOR, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION*

**BRIEF FOR THE ADMINISTRATOR OF THE WAGE
AND HOUR DIVISION**

This is an appeal from a final order of the District Court granting an application of the Administrator of the Wage and Hour Division of the Department of Labor to enforce a subpoena duces tecum requiring appellant to produce books, records, papers, and documents described in the subpoena.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. Appellant also relies upon Section 13 (a) (2). These provisions are set forth in the Appendix.

PROCEEDINGS BELOW

Upon the refusal of appellant corporation to permit any inspection of its records by the Wage and Hour Division, a subpoena duces tecum signed by the Administrator of the Division was duly served on C. H. Detweiler, president of appellant corporation, on July 28, 1944, requiring the appellant to appear before a designated representative of the Division in Twin Falls, Idaho, on August 18, 1944, to produce specified books and papers in a matter "involving an investigation pursuant to the provisions of Sections 9 and 11 (a) of the Fair Labor Standards Act of 1938, of complaints of violations by the said Corporation * * *" (R. 2-8, 20-21, 23-24). The records called for were appellant's wage and hour records for its employees during a particular period, and the books, records, invoices and other documents showing appellant's purchases from and shipments to points outside the State of Idaho, during the same period (R. 23-24).

The issuance of the subpoena duces tecum by the Administrator occurred only after a long period of negotiation between the Wage and Hour Division and the appellant, throughout which the Division sought to inspect appellant's records at its place of business in Twin Falls (Exs. A, B, and D; R. 9-19, 21-22). An inspector first applied for permission to examine the company's records on May 12, 1943, again on May 21, 1943, and subsequently on four occasions between June 7, 1943, and November 23, 1943, pursuant to a letter from appellant's attorney authorizing the Division "to inspect the sales invoices and accounts receivable for a representative period of at least twelve months; also, the entire pay roll record from October 24, 1938, to the present date" (R. 14-15). The

final effort to make the inspection, on a specific appointment made by appellant's president, was likewise fruitless (R. 17, 20).

Following appellant's refusal to comply with the subpoena, the Administrator applied to the district court for an enforcement order. The application (R. 2-8) alleged, on information and belief, that appellant is engaged in the business of buying, manufacturing and selling plumbing, sheet metal and heating supplies and, in connection with its business, is engaged in the production of goods for interstate commerce and in commerce within the meaning of the Act. It alleged also that all the books, papers and documents referred to in the subpoena were "relevant material and appropriate to determine whether respondent has violated * * * the Act and will aid in the enforcement of the provisions of the Act" (R. 7).

In response to an order to show cause why the subpoena should not be enforced (R. 25-27), appellant admitted that it purchases, sells and installs sheet metal and heating supplies, but denied that it is engaged in commerce or the production of goods for commerce (R. 30). Appellant asserted further that its business constitutes a "retail service establishment," and that the plumbing and sheet metal workshops which it admittedly operates at its place of business perform work incidental to retail sales or to "new construction work for retail customers within the State" (R. 30-31). The appended affidavit of appellant's secretary stated that appellant's "sheet metal work is of course fabrication work * * * but [appellant] does work only for installation in specific places and in specific buildings and in connection with its business, principally the installation of furnaces" (R. 36-37). In a supplemental

affidavit appellant admitted that it manufactures insulation material, i. e., that it "purchases diatomaceous earth in Idaho which it mixes by machine with paper, places in sacks" and installs in buildings (R. 39-40). It further admitted that it purchases "a large percentage" of its goods outside the State (R. 40).

The Division's inspector also filed an affidavit in which he stated, on information and belief, that appellant purchases outside the State electrical, plumbing, heating and refrigeration parts and appliances which it installs and services for industrial and commercial firms; that appellant "is engaged in tin and sheet metal work for various types of industries including seed houses, flour mills, and creameries"; that appellant manufactures insulation material, some of which is sold to out-of-State commercial and industrial users; and that appellant manufactures, installs and services plumbing and heating systems for commercial and industrial firms (R. 42-43).

The district court granted the Administrator's application and issued an order requiring respondent to produce the records specified in the subpoena (R. 49-51), stating that "all that is required of the Administrator is to inform the Court, on information and belief that he has reason to believe that the respondent is within the Act" (R. 47). The court said that *Endicott-Johnson Corp. v. Perkins*, 317 U. S. 501, "seems to be controlling on this question."

QUESTIONS PRESENTED

1. Whether the district court's order of enforcement of the subpoena duces tecum issued by the Administrator of the Wage and Hour Division was within the statutory authorization conferred by Sections 9 and 11 (a) of the Act.

2. Whether the enforcement of the subpoena would violate rights guaranteed by the Fourth Amendment to the Constitution.

ARGUMENT

Introduction.—Appellant contends (1) that the Administrator must prove that an employer is subject to the Act before he is entitled to judicial enforcement of his subpoena, (2) that the Administrator must at least show that he had reasonable cause to believe that a given business is subject to the Act before he is entitled to inspect its records, and (3) that enforcement of the subpoena would subject it to an illegal search and seizure. Our answers to these contentions are (1) that the decisions of the various Circuit Courts of Appeals which have ruled on the question unanimously hold that the Act authorizes judicial enforcement of a subpoena without a hearing or determination of the issue whether the employer is subject to the Act, (2) that if, as some of the Circuit Courts of Appeals have ruled, it must appear that “reasonable grounds” exist for believing that the employer is subject to the Act, such reasonable grounds sufficiently appear in the instant case, and (3) that the subpoena here is specific and limited to documents clearly relevant to the inquiry and therefore does not violate any Constitutional rights.

I

The district court properly ordered compliance with the Administrator’s subpoena without a prior hearing on, or determination of, the issue whether the appellant’s business is subject to the Act

Appellant contends that the district court did not have authority to enforce the subpoena unless appellant’s business was shown to be subject to the Act (br., pp. 9–10,

12-16). The Administrator's position is that a determination of coverage is not a condition precedent to the judicial enforcement of the subpoena. All the Circuit Courts of Appeals which have ruled upon this question are in agreement that enforcement of the Administrator's subpoenas is not dependent upon a prior hearing on, or determination of, the issue whether the employer is subject to the Act. *Martin Typewriter Co. v. Walling*, 135 F. (2d) 918 (C. C. A. 1); *Walling v. Standard Dredging Corp.*, 132 F. (2d) 322 (C. A. A. 2), certiorari denied 319 U. S. 761; *Walling v. News Printing Co.*, 148 F. (2d) 57 (C. C. A. 3); *Mississippi Road Supply Co. v. Walling*, 136 F. (2d) 391 (C. C. A. 5); *Walling v. LaBelle Steamship Co.*, 148 F. (2d) 198 (C. C. A. 6); *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7), certiorari denied 311 U. S. 690; *Walling v. Benson*, 137 F. (2d) 501 (C. C. A. 8), certiorari denied 320 U. S. 791; *Oklahoma Press Pub. Co. v. Walling*, 147 F. (2d) 658 (C. C. A. 10).¹

Appellant relies heavily upon the decisions in *General Tobacco & Grocery Co. v. Fleming*, 125 F. (2d) 596 (C. C. A. 6), and *In re Application of Walling*, 49 F. Supp. 659 (D. N. J.) (br., p. 12), in both of which cases the courts held that the enforcement of the subpoena depended upon a showing that the employer was subject to the Act. However, the second decision was recently

¹ See also *Cudahy Packing Co. v. Fleming*, 122 F. (2d) 1005 (C. C. A. 8), reversed 315 U. S. 785, on the ground that the subpoena in that case was not issued by the Administrator; *Cudahy Packing Co. of Louisiana v. Fleming*, 119 F. (2d) 209 (C. C. A. 5), reversed on the same ground 315 U. S. 357.

Petitions for certiorari were granted by the Supreme Court in the *News Printing* and *Oklahoma Press* cases, *supra*, apparently on the question of the need of a showing of "probable cause." See *infra* p. 17.

reversed by the Circuit Court of Appeals for the Third Circuit in *Walling v. News Printing Co.*, *supra*, and the recent decision of the Sixth Circuit in *Walling v. LaBelle Steamship Co.*, *supra*, while it does not expressly overrule the *General Tobacco* decision, clearly abandons the position that a hearing and determination of coverage is a prerequisite to enforcement of a subpoena.² There is plainly no conflict among the circuits on this point.

This Court has not yet had occasion to pass on the question of judicial enforcement of a subpoena issued under the Fair Labor Standards Act, but did decide a quite similar issue in the case of *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566, 571 (C. C. A. 9). In denying the motion to suppress certain evidence secured by Office of Price Administration investigators in the course of an inspection, the Court made the following remarks which we think are equally applicable to the investigatory powers conferred by the Fair Labor Standards Act (146 F. (2d) at 571):

To effect the end desired Congress clothed the Administrator with * * * investigatory powers commensurate with his responsibilities, arming

² The *LaBelle* opinion states that the Administrator "is entitled to the desired order without the necessity of an actual showing that the employer proceeded against is clearly within the provisions of the Act" where he has "reasonable grounds to believe that such employer is covered or that such person has information essential to the investigation." 148 F. (2d) at 201. Thus the Sixth Circuit obviously no longer adheres to the position it asserted in *General Tobacco & Grocery Co. v. Fleming*, 125 F. (2d) 596, 602, that: "On the issue of fact tendered by appellant's answer, the Administrator must show that appellant is engaged in interstate commerce or in the production of goods for interstate commerce before he will be entitled to the relief prayed for in his application."

him both with authority to inspect and with the power of subpoena. * * * The existence of probable cause for believing that the Act has been violated is not made a prerequisite to inspection, cf. *Fleming v. Montgomery Ward & Co., supra.* * * * There is a presumption of regularity in respect of the proceedings of administrative bodies. Hence it is to be presumed that the Administrator has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent.

Section 11 (a) of the Fair Labor Standards Act authorizes the Administrator to conduct investigations. Section 9 of the Act authorizes the Administrator for the purposes of such investigations to issue subpoenas which the district courts are empowered to enforce. The Act confers upon the Administrator express authority to conduct two distinct types of investigatory proceedings (Sec. 11 (a)). It authorizes the Administrator to "investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to the Act * * *." Such an investigation is for the purpose of gathering statistical data and is not a means of enforcing the Act. Investigations of the second type, like the one involved here, are for the purpose of law enforcement. With respect to the second type, the Administrator is authorized to

enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices or matters as he may deem necessary or appropriate *to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act.* [Italics supplied.]

The Second Circuit in *In re Standard Dredging Corp.*, 44 F. Supp. 601 (S. D. N. Y.), affirmed 132 F. (2d) 322 (C. C. A. 2), certiorari denied 319 U. S. 761, clearly pointed out the purpose and scope of this power:

The second power is designed to facilitate the enforcement of a law which necessarily requires on [the] part of the government an intimate acquaintance with working conditions, wages and hours of employing in individual establishments. The power granted is as broad as the need. "To determine whether any person has violated any provision of this Act" [it] is no more requisite to know what wages he pays and what hours he keeps than to know whether he is engaged in commerce (p. 602).

To the same effect see *Walling v. American Rolbal Corp.*, 135 F. (2d) 1003 (C. C. A. 2).

The administrative determination "whether any person has violated any provision of this Act," contemplated by Section 11 (a), is a necessary prerequisite to a suit by the Administrator for an injunction, authorized by Section 17. The courts have recognized that this determination—and therefore the investigation preceding it—must relate to coverage as well as to underpayment. Both of these are, equally, essential elements of violation. The subpoena here involved properly related to both. Consequently, "to hold that the Administrator cannot compel the production of data relating to coverage until that question has been conclusively determined, is to deny him the very powers deemed necessary in order to effectuate the purposes of the Act." *Oklahoma Press Pub. Co. v. Walling*, 147 F. (2d) 658 at 662.

In *Endicott-Johnson Corp. v. Perkins*, 317 U. S. 501, where an administrative officer was authorized to investi-

gate violations which involved both coverage and non-compliance, the Supreme Court held it was error for the district court to condition enforcement of a subpoena upon proof of coverage. The subpoena involved in that case was issued by the Secretary of Labor under the Public Contracts Act ³ (see Secs. 4 and 5), and required the production of pay-roll records of certain employees whom the Secretary allegedly "had reason to believe" were covered by the provisions of the Act. The Supreme Court ruled that the district court had no authority "to condition enforcement of her subpoenas upon her first reaching and announcing a decision on some of the issues in her administrative proceeding" (317 U. S. 509). The Court held that while the scope of the Secretary's investigation necessarily involved an examination of wage underpayment, "of course *another indispensable element of violation is that the underpaid employee be included within the benefits of the Act and contracts. This, too, was a matter under investigation in the administrative proceeding*" (317 U. S. at 508). [Italics supplied.] Pointing out that the district court's ruling "would require the Secretary, in order to get evidence of violation, either to allege she had decided the issue of coverage before the hearing or to sever the issues for separate hearing and decision," the Court held that "the former would be of dubious propriety, and the latter of doubtful practicality." The Court affirmed the ruling of the Second Circuit which, reversing the district court, held that "the District Court should have enforced the subpoenas, on the pleadings, without taking any testimony whatever" (128 F. (2d) 208, 211).

³ Act of June 30, 1936, c. 881, 49 Stat. 2036, 41 U. S. C., secs. 35-45.

Although the Public Contracts Act and the Fair Labor Standards Act occupy different areas and contain somewhat different procedural features, both prohibit payment of substandard wages and provide for fundamentally similar investigatory functions in their respective fields of coverage. To determine the existence of violations, the Administrator, like the Secretary of Labor, must investigate coverage as well as under-payments, both elements being as "indispensable" to a finding of violation under the Fair Labor Standards Act as they are to a finding of violation under the Public Contracts. If the Administrator were required to prove that an employer or his employees are subject to the Act as a condition precedent to securing judicial enforcement of his subpoena, it would equally defeat the Congressional plan. We submit that the court below correctly held the *Endicott-Johnson* decision applicable here. The relevance of that decision has been recognized by the Third, Fifth and Eighth Circuits;⁴ the First and Second Circuits have properly viewed it as controlling.⁵

The statement of the Seventh Circuit in *National Labor Relations Board v. Northern Trust Co.*, 148 F. (2d) 24, which involved a subpoena compliance proceeding

⁴ In *Walling v. News Printing Co.*, 481 F. (2d) 57 at 60 the Third Circuit held the *Endicott-Johnson* decision "persuasive in determining the issues presented by the case at bar." And the Eighth Circuit, in *Walling v. Benson*, 137 F. (2d) 501 at 504, fn. 2, stated that the Supreme Court's "expressions have been accepted in some of the cases * * * as clearly pointing the way on the question and we think soundly so." And see *Mississippi Road Supply Co. v. Walling*, 136 F. (2d) 391, 393 (C. C. A. 5).

⁵ *Martin Typewriter Co. v. Walling*, 135 F. (2d) 918; *Walling v. Standard Dredging Corp.*, 132 F. (2d) 322, certiorari denied 319 U.S. 761.

under the National Labor Relations Act, provides, we think, the appropriate answer to appellant's objections:

Appellants have made a valiant effort to distinguish *Endicott-Johnson Corp v. Perkins*, 317 U. S. 501, but while they have pointed out certain factual differences, they have failed to demonstrate the inapplicability of the principle therein enunciated [at 27].

While there have been different views expressed regarding the extent to which *Endicott-Johnson Corp. v. Perkins* is applicable to the Fair Labor Standards Act, the weight of authority clearly holds that the principles expressed by the Supreme Court are pertinent to the construction of this Act. In any event, all of the Circuit Courts of Appeals are agreed that no trial or determination of coverage is required. The reasoning of the First Circuit, in which the Third Circuit specifically concurred, is that to require such proof would turn an investigatory proceeding "into a lawsuit to decide a question which must be decided by the Administrator in the course of his investigation, and which, if decided wrong, can be corrected later in a proceeding to enforce the orders of the Administrator." ⁶

The Fifth Circuit has declared that "convenience in

⁶ *Martin Typewriter Co. v. Walling*, 135 F. (2d) 918. See also *Walling v. News Printing Co.*, 148 F. (2d) 57 at 60 (C. C. A. 3). To the same effect, see *Walling v. LaBelle Steamship Co.*, 148 F. (2d) 198. The Third Circuit, in reversing the district court, also noted that the lower court "did not treat the Administrator's application for the execution of the subpoena as a part of a procedure instituted by the officer charged with the administration of the Act," but erroneously "treated the Administrator's application as if it were a proceeding to impose the strict legal sanctions of Section 16 * * *."

most cases dictates that both 'coverage' and 'violations' be inquired about in a single investigation. * * * and we accordingly hold that in such investigations the investigating authority has generally the right to look first into either question or into both concurrently." *Mississippi Road Supply Co., v. Walling*, 136 F. (2d) 391 at 394.

The decisions stress the preliminary character of the proceedings and the duty of the court to "give full facilitating cooperation to the administrative investigatory function." See *Walling v. Benson*, 137 F. (2d) at 505 and *Walling v. News Printing Co.*, 148 F. (2d) 57 at 58. "If on the face of things a lawful inquiry is in progress, the court ought to assist it, assuming the inquiring body will confine itself to the lawful functions." *Mississippi Road Supply Co. v. Walling, supra*, at 394. Because of the "presumption of regularity in respect to the proceedings of administrative bodies * * * it is to be presumed that [an] Administrator has not acted oppressively or undertaken to pursue investigations where no need therefor is apparent." *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566, 571 (C. C. A. 9).

Appellant claims (br., pp. 9, 33-34) not only that the Administrator must show that appellant is engaged in commerce or the production of goods for commerce, but also that the Administrator must affirmatively prove that appellant is not entitled to any of the statutory exemptions. We submit that all of the reasons mentioned above for not requiring the Administrator to establish the applicability of the Act to a respondent in a subpoena enforcement proceeding apply with particular force to claims of exemption.

To require the Administrator to prove that the re-

spondent's employees are not exempt would not merely involve the impracticability and impropriety of turning this preliminary proceeding into a trial of coverage issues. It would also do violence to important and well-settled principles of statutory construction and of pleading and proof. As this Court has observed, "It is elementary, of course, that the Act is remedial and that persons claiming to come within exemptions therein must bring themselves within both the letter and the spirit of the exceptions, which are subject to a strict construction." *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, 106 (C. C. A. 9). Accord: *A. H. Phillips, Inc. v. Walling*, 65 S. Ct. 807. A corollary of this principle is that the burden of pleading and proving exemption from a statute of this character is upon the party claiming the exemption. *Schmidtke v. Conesa*, 141 F. (2d) 634 (C. C. A. 1); *Fleming v. Hawkeye Pearl Button Co.*, 113 F. (2d) 52 (C. C. A. 8); *Stratton v. Farmers Produce Co.*, 134 F. (2d) 825, 827 (C. C. A. 8); *Bowie v. Gonzalez*, 117 F. (2d) 11 (C. C. A. 1); *Helliwell v. Haberman*, 140 F. (2d) 833 (C. C. A. 2). Thus it has been held that a plaintiff "is certainly not required to negative the exemptions of the statute in order to state a cause of action." *Stratton v. Farmers Produce Co.*, *supra*, at 827; *Schmidtke v. Conesa*, *supra*, p. 635.

The implication of appellant's contention that the Administrator has the burden of disproving exemptions in a proceeding to enforce the subpoena is therefore contrary to settled principles and unsupported by authority. Indeed, even if appellant claimed only that it is entitled to a hearing on the exemption but is not relieved of the burden of proof, it would nonetheless be objectionable.

The trial of exemption issues before the Administrator has had access to the employer's records would find the Administrator seriously handicapped in attempting to disprove or rebut the evidence advanced by the employer.

The subpoena cases involving exemption claims have consistently upheld the Administrator's right to enforcement without prior hearing or proof with respect to the exemption issue. The subpoenas enforced by the First, Fifth and Tenth Circuits in the *Martin Typewriter Co.*, *Mississippi Road Supply Co.* and *Oklahoma Press Pub. Co.* cases were likewise contested on the ground that an exemption applied—the same retail or service establishment exemption claimed in the instant case. Similarly, the subpoenas in *Walling v. LaBelle Steamship Co.* and *Standard Dredging Corp. v. Walling* were enforced by the Sixth and Second Circuits respectively, without requiring the Administrator to disprove the claims of the employers that their employees were exempt as seamen. See also *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 at 392 (C. C. A. 7), certiorari denied 311 U. S. 670.

Upon the record before this Court, there is plainly no merit in appellant's assertion (br. pp. 34-45), based solely on its own allegations in its affidavits, that "the weight of authority is clear that an establishment such as appellant's is within the exemption set out" in Section 13 (a) (2) for retail and service establishments. The decisions are in agreement that to determine the applicability of an exemption, the court must have before it all the pertinent facts. See cases cited *supra*, p. 14, and also *Castaing v. Puerto Rican American Sugar Refinery*, 145 F. (2d) 403, 405 (C. C. A. 1). Obviously more facts are

required than are available in a preliminary proceeding of this character. The affidavits in the record here are not only insufficient to establish appellant's claim, but they cast considerable doubt upon it. By appellant's own admission (R. 39-40), it engages in the manufacture of insulation material and the fabrication of sheet metal, clearly nonretail activities. And in the light of the Government inspector's affidavit "on information and belief" asserting that appellant serves industrial and commercial users as well as private customers, it appears that appellant's characterization of all its sales as "retail" is at least subject to challenge. Appellant does not specify the exact nature of the alleged "retail sales" of sheet metal, insulation, and plumbing and heating parts. If such sales are to "industrial and commercial users purchasing for a business motive" they are nonretail and Congress did not intend to exempt employers in this category. *Walling v. Consumers Co.*, 8 Wage Hour Rept. 351 at 353 (C. C. A. 7, 1945). In *Walling v. Roland Electrical Co.*, 146 F. (2d) 745, 748, the Fourth Circuit held that labor performed in installing and repairing electrical wiring and motors for "commerical or industrial concerns, where the cost of the service would not be absorbed by the one to whom they were rendered but would be passed on as a part of the price of the product" was not performed in a retail or service establishment.⁷ And see *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. (2d) 863 (C. C. A. 9), certiorari denied 65 S. Ct. 117.

⁷ In its brief (p. 36) appellant relies on the district court decision in this case which was reversed by the Fourth Circuit in the opinion discussed above.

There was "probable cause" for the issuance of the Administrator's subpoena

Appellant contends (br. p. 16) that the Administrator is at least required to establish "probable cause" for making the investigation. On this issue there is a variation in views expressed by the Circuit Courts of Appeals, and the question is currently pending before the Supreme Court in the cases of *Oklahoma Press Pub. Co. v. Walling*, No. 1171, certiorari granted May 21, 1945, and *News Printing Co. v. Walling*, No. 1179, certiorari granted May 21, 1945. We believe, however, that this question is of no particular importance in the instant case because, as we shall show, there is a sufficient showing of probable cause here to meet any such requirement.

The First, Second, Third, and Seventh Circuits have held that the Administrator is entitled to an enforcement order upon his application without showing of "probable cause" for making the investigation.⁸ As noted above, *supra*, p. 7, this Court has held in a comparable situation involving the power of inspection conferred by the Price Control Act that "the existence of probable cause for believing that the Act has been violated is not made a prerequisite to inspection" and that there is a presumption of regularity of the proceedings of public officers. *Bowles v Glick Bros. Lumber Co.*, 146 F. (2d) at 571. While this statement related to the question of compliance rather than coverage, the same principles would appear to be

⁸ *Martin Typewriter Co. v. Walling*, *supra*; *Standard Dredging Corp. v. Walling*, *supra*; *Walling v. News Printing Co.*, *supra*, and *Fleming v. Montgomery Ward & Co.*, respectively.

applicable here. Other Circuits, the Eighth, Tenth, and Sixth, while upholding the Administrator's right to judicial enforcement without a determination of actual coverage, require a showing in the district court of "probable cause" or "reasonable ground to believe that [the industry] is subject to the Act." *Walling v. Benson*, 137 F. (2d) at 505-506 (C. C. A. 8), certiorari denied 320 U. S. 791. From a practical standpoint, this requirement is apparently satisfied "if the application and accompanying affidavits furnished reasonable grounds for the belief that [respondent] or any of its employees were subject to the Act." *Oklahoma Press Pub. Co. v. Walling*, 147 F. (2d) at 662. In *Walling v. LaBelle Steamship Co.*, the Sixth Circuit said that the Administrator "is entitled to the desired order without an actual showing that the employer proceeded against is clearly within the provisions of the Act," where he has "reasonable grounds to believe that such employer is covered or that such person has information essential to the investigation." 148 F. (2d) at 201.⁹

While we think that these decisions requiring some showing of "probable cause" place a heavier burden on the Administrator than is warranted, there is a sufficient showing in the instant case to meet the standards prescribed by these cases. Appellant admitted that it pur-

⁹ The position of the Fifth Circuit on "probable cause" is not clear since in the *Mississippi Road Supply* case the district court required the parties to submit affidavits as to whether there was probable cause for the investigation and ruled that probable cause was shown. The circuit court held that the district court "had a discretion to abstain from a present, final inquiry" into the questions of coverage and violations and "to assist a full inquiry by the Administrator." 136 F. (2d) at 393. The circuit court also held that the "presumption of regularity" places the burden of showing that the inquiry is unlawful upon the employer.

chases "a large percentage" of its goods outside the state (R. 40) and it is well settled that activities connected with the ordering, handling and unloading of such extra-state merchandise are a part of interstate commerce. *Fleming v. Jacksonville Paper Co.*, 128 F. (2d) 395, 398 (C. C. A. 5), affirmed 317 U. S. 564; *Phillips v. Walling*, 144 F. (2d) 102, 104 (C. C. A. 1), affirmed 65 S. Ct. 807; *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331, 338, 339 (C. C. A. 8). From the affidavit of the Wage and Hour Division's inspector, necessarily made on information and belief, it is reasonable to assume for purposes of this proceeding that appellant also sells in interstate commerce and is engaged in the production of goods for such commerce (R. 42-43). That there are reasonable grounds to believe that appellant is not exempt from the Act likewise appears from the affidavits as well as from the decisions discussed *supra*, p. 15-16. The showings held sufficient in the *Oklahoma Press* and *La-Belle* cases, *supra*, were based upon similar information and indications. As a practical matter, the Administrator before securing the employer's records, is in no position to make more of a showing. The application and affidavits filed in the district court accordingly satisfied the requirement of probable cause since they "furnished reasonable grounds for the belief that [respondent] or any of its employees were subject to the Act." See *Oklahoma Press Pub. Co. v. Walling*, *supra*, at p. 662.

To hold that the Administrator is entitled to judicial enforcement without making a showing of coverage does not result in the "subjugation of the judiciary by the executive branch," nor make of the court "a mere rubber stamp," as appellant contends (br. pp. 25, 26, 32). There

are a number of defenses that may appropriately be made to an application for enforcement of an administrative subpoena. The application may properly be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome (*Hale v. Henkel*, 201 U. S. 43; *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298; *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447); or that the hearing is not of the kind authorized (*Harriman v. Interstate Commerce Comm.*, 211 U. S. 407; *Ellis v. Interstate Commerce Commission*, 237 U. S. 434); or that the subpoena was not issued by the person solely vested with that power (*Cudahy Packing Co. v. Holland*, 315 U. S. 357). No such objections have been raised here.

III

THE SUBPOENA DOES NOT VIOLATE THE FOURTH AMENDMENT

Appellant makes a lengthy argument on the basis of the decision in *Federal Trade Comm. v. American Tobacco Co.*, 264 U. S. 298 (br., pp. 20-34). The charge that appellant is being subjected to an unreasonable search and seizure is wholly unfounded. The subpoena is limited to specific books and records showing the wages paid to and hours worked by appellant's employees during a particular period and shipping records and documents showing the source and destination of goods handled by appellant. The information contained in these records is clearly relevant to the determination of whether or not violations exist, a determination which the Administrator is obligated to make as the enforcement officer appointed by Congress. To describe an investigation so circumscribed in character as a "general 'fishing expedition' " (br., p. 21) is a distortion of the facts.

Reliance is placed chiefly upon the case of *Federal Trade Comm. v. American Tobacco Co.*, *supra*. But the *American Tobacco* case is plainly inapplicable; subpoenas similar in form and scope to the subpoena here involved have been repeatedly enforced. *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7), certiorari denied 311 U. S. 690; *Walling v. Benson*, 137 F. (2d) 501 (C. C. A. 8), certiorari denied 321 U. S. 775. See also the numerous other cases cited at page 6, *supra*. As the Seventh Circuit pointed out in the *Montgomery Ward* case, the vice of the subpoena involved in the *American Tobacco* case was that it was not limited to documents which would have been material or relevant, but extended to substantially all of the respondent's papers: "The [American Tobacco] decision is limited to the proposition that the United States Government may demand only records and papers which are relevant to a lawful inquiry, or stated negatively, the Government may not demand unlimited access to all the corporation records, whether relevant or irrelevant to the subject of inquiry or investigation" (114 F. (2d) at 391). If the demand is reasonably specific and limited to documents relevant to the inquiry then in progress, the requirements of the Fourth Amendment are satisfied. *Penfield Co. v. Securities & Exchange Comm.*, 143 F. (2d) 746, 751 (C. C. A. 9), certiorari denied 65 S. Ct. 121 (1944); *Consolidated Mines v. Securities & Exchange Comm.*, 97 F. (2d) 704, 707-708 (C. C. A. 9); *Bowles v. Glick Bros. Lumber Co.*, 146 F. (2d) 566, 571 (C. C. A. 9); *Wilson v. United States*, 221 U. S. 361; *Hale v. Henkel*, 201 U. S. 43; *Baltimore & Ohio R. R. Co. v. Illinois*, 221 U. S. 612; *Interstate Commerce Comm. v. Brimson*, 154 U. S. 447.

The subpoena here involved is well within the rule. Both the administrative demand and the court order were specific and definite and the records required are clearly relevant to the lawful inquiry. It follows that the subpoena does not violate the Fourth Amendment.

CONCLUSION

The decision of the district court enforcing the Administrator's subpoena should be affirmed.

Respectfully submitted.

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JUNE 1945.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C., sec. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11 (a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether *any* person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

SEC. 13 (a). The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce.

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. sec. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

No. 10988

United States
Circuit Court of Appeals
For the Ninth Circuit

DETWEILER BROS., INC., a Corporation,
Appellant,

vs.

L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor,
Appellee.

Reply Brief

Upon Appeal from the District Court of the United States
for the District of Idaho
Southern Division

HON. CHASE A. CLARK, District Judge

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JUN 11 1945

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Reply Brief

Appellant contends that, when the entity sought to be investigated denies that it is within the contemplation of the Fair Labor Standards Act, before a Subpoena is ordered there must be a determination of coverage, or that *at least* the administrator must make a sufficient factual showing to assure the Federal Court "that it is not giving judicial sanction and force to unwarranted and arbitrary action, but that reasonable grounds exist for making the investigation." Walling v. Benson, 8 Cir., 137 F. 2d 501; Okla. Press Pub Co. v. Walling, 147 F. 2d 658.

Appellee on the other hand contends that "a determination of coverage is not a condition precedent to the judicial enforcement of the subpoena" (Appellee's brief, p. 6); that although "requiring some showing of 'probable cause' places a heavier burden on the Administrator than is warranted, there is a sufficient showing in the instant case" to meet this requirement.

So, we see that both appellant and appellee have a two-pronged contention, there being a direct clash upon the legal question of whether coverage should be determined prior to judicial enforcement of the Administrator's subpoena duces tecum, and anti-ethical contentions upon the *fact* question of whether the the Administrator has made a sufficient showing

to assure the Federal Court that appellant is probably within the Act.

Then, we have the District Court's ruling that the only purpose of the hearing was to have an enforcement order issued, which of course supports the appellee upon the legal question of the proper time to determine coverage, and we also have the District Court's finding that the weight of the evidence, upon the factual question of whether appellant is within the Act, is in favor of appellant. As stated in appellant's opening brief, there being no appeal by appellee from this factual finding of the District Court, it cannot be here disputed that the weight of the evidence is to the effect that appellant is not one of the businesses subject to the Fair Labor Standards Act.

Therefore, with the issues thus framed, it would seem that the appellate court must do one of the following things: (1) Make a clear-cut decision as to whether, when appellant claims to be without the Act, a determination as to coverage is a condition precedent to obtaining an enforcement order; (2) Make a clear-cut decision as to what facts the Administrator must show when appellant claims to be without the Act. A decision on the second point would necessarily have to be in appellant's favor because of the established fact that the weight of the evidence is to the effect that appellant is not within the Act, which of course means appellee has

not advanced sufficient grounds to show that reasonable grounds exist for making the investigation.

Time to Determine Coverage

Why is appellant so insistent upon a determination of coverage at this time? Because appellant wishes to put an end to all this litigation and unnecessary expense. Because appellant wants to know where it stands, whether it must comply with all the regulations of the Fair Labor Standards Act, and whether the salaries of its employees will be lowered as so often happens when a particular business is brought within the Act.

On the other hand, suppose that the determination of coverage is put off until some future date which may well be several years from now. Appellant, believing it is without the Act, will proceed as though without the Act, be forced to go through more and more litigation, incur more and more expense, run the risk of violating innumerable rules and regulations, until coverage is finally settled.

On page 6 of appellee's brief it is stated: "All the Circuit Courts of Appeals which have ruled upon this question are in agreement that enforcement of the Administrator's subpoenas is not dependent upon a prior hearing on, or determination of, the issue whether the employer is subject to the Act." Before we examine the cases cited in support of that bold statement, we call the Court's attention to this in-

consistent statement also on page 6 of appellee's brief: "Appellant relies heavily upon the decisions in *General Tobacco & Grocery Co. v. Fleming* . . . and *In re Application of Walling* . . . in both of which cases the courts held that the enforcement of the subpoena depended upon a showing that the employer was subject to the Act."

In *Martin Typewriter Co. v. Walling*, 135 F 2d 918, (C.C.A. 1), as pointed out on page 18 of our opening brief, the employer admitted that it did some interstate business. Here, appellant denies that it does any interstate business. *Walling v. Standard Dredging Corp.*, 132 F. 2d 322, C.C.A. 2nd, gave blanket approval to *In Re Standard Dredging Corporation*, 44 F. Supp, 601, which held the Administrator need make no showing to obtain enforcement of his subpoena. In *Walling v. News Printing Co.*, 148 F. 2d 57, C.C.A. 3rd, the following language appears to be considered: "From the affidavits filed by the respondent it appears that some of the newspapers published by the respondent move in interstate commerce." *Miss. Road Supply Co. v. Walling*, 136 F. 2d 391, C.C.A. 5th, is in appellant's favor for it says:

"But if it is made to appear that the investigation is clearly without just authority, as that the person investigated is clearly not under the Act and that grave inconvenience or injury

may result, the Court may very properly decline to assist."

In *Walling v. LaBelle Steamship Co.*, 148 F. 2d 198, C.C.A. 6th, which appellee states "clearly abandons the position that a hearing and determination of coverage is a prerequisite to enforcement of a subpoena" (Appellee's brief, p. 7), it was stated: "Here appellee admits it is engaged in interstate commerce . . ." In that case, the Circuit Court again distinguished the *Endicott-Johnson* case thus:

"The Walsh-Healey Act commits to the Secretary of Labor the issue of coverage of employees by employers doing business by voluntary contract with the United States Government. The ultimate issue of coverage under the Fair Labor Standards Act is a judicial question committed to the courts. Because of this distinction, the *Endicott-Johnson* case is distinguishable from the case at bar. *Oklahoma Press Publishing Company v. Walling*, 10 Cir., 658 F. 2d 147."

In *Fleming v. Montgomery Ward & Co.*, 114 Fed. 384, as stated in the footnote, page 603, to the case of *Application of Holland*, 44 F. Supp. 601, "Since respondent is subject to the Act, the investigation is a lawful inquiry." As stated in our opening brief, *Walling v. Benson*, 137 F. 2d 501, C.C.A. 8th, required the Administrator to make a showing sufficient to convince the District Court that the one

sought to be investigated was probably within the Act. The case of Oklahoma Press Pub Co. v. Walling, 147 F. 2d 658, distinguished the Walsh-Healey Act from the Fair Labor Standards Act thus:

“Unlike the Walsh-Healey Act, the ultimate issue of coverage under the Fair Labor Standards Act is a judicial question committed to the courts and not to the Administrator. We do not think that the philosophy of *Endicott-Johnson Corp. v. Perkins*, supra, is authority for the contention of the Administrator to the effect that the courts are deprived of the power of discretion in the performance of the judicial function expressly committed to them and denied to the Administrator.”

The above discussion shows conclusively that there is a definite split upon the legal question of when coverage may be determined.

On page 8 of appellee's brief is outlined the theory conceived and adopted by the appellee and the authorities supporting appellee. It is true that the Administrator is authorized to conduct investigations, issue subpoenas and that the District Court is empowered to enforce those subpoenas. But does the empowering of a District Court to do certain things mean that it has no discretion in determining whether or not it should do those certain things? Such an idea is repugnant to the Constitution of the

United States and the dignity of every Court in the land.

Do the statutory provisions cited by appellee, sustain his contention that the office of the Federal Courts in matters of this type is but another step of technical procedure, and in order to obtain license to invade the privacy of any business in the United States all the Administrator need do is plank down in Federal Court the necessary filing fee in the same manner as a hunter obtains a hunting license, and then the Administrator may hunt to his heart's content?

Of course not; Section 9 of the Federal Trade Commission Act, which is adopted by Section 9 of the Fair Labor Standards Act, provides:

“ . . . in case of disobedience to a subpoena the commission (here Administrator) may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

“Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order to appear before the commission, or to produce documentary evidence if so ordered, or to give

evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

It is difficult for appellant to find anything in the above statute that makes it mandatory upon the District Court to enforce the Administrator's subpoena duces tecum. How can that statute, which contains only permissive language, be turned into an ultimatum to the District Court?

Well, Sec. 11. (a), of the Fair Labor Standards Act first undergoes an amputation. It becomes not one sentence, but two, each with a separate and different name, a separate and different meaning and a separate and different applicability. Then, the two sentences, with their own peculiar meanings, are fused into one again, and in some mysterious way, "may" has become "must," and, in the interest of expediency of an administrative proceeding, the discretion of a Federal Court to issue or deny enforcement of a subpoena is done away with. The opinion of the Administrator supplants that of the Federal Court.

Let's see what Sec. 11(a) looked like before it was disfigured:

"Sec. 11(a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and

other conditions and practices of employment in any industry SUBJECT TO THIS ACT and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act . . .”

The first portion of the above section, the italic portion, is, we are told, an investigation “for the purpose of gathering statistical data and is not a means of enforcing the Act.” (Appellee’s Brief, p. 8). The latter portion, “Investigations of the second type, like the one involved here, are for the purpose of law enforcement” , (Appellee’s Brief, p 8), states appellee, i. e., to determine whether any person has violated any provision of the Act. But in order to determine whether any person has violated any provision of the Act, the two types of investigation above mentioned “must relate to coverage as well as underpayment,” because “both of these are, equally, essential elements of violation,” and “The subpoena here involved properly related to both.” (Appellee’s Brief, p. 9). Consequently, continues the Administrator, he should not be required to prove coverage because that is the whole thing in a nut-shell.

After reading and studying the arguments of both

appellant and appellee, hyper-technical though they may be, we see that, no matter how you may belabor it, the naked issue before the Court is whether the statutes heretofore discussed relegate a Federal Court to a position subject to the beck and call of the Administrator of the Fair Labor Standards Act.

Walling v. Roland Electrical Co., 146 F. 2d 745, does not support the Administrator's contention that appellant is not a retail or service establishment within the exemption clause of the Fair Labor Standards Act. We find in syllabus No. 6 of that case:

“Where practically all of customers of employer engaged in repairing and rebuilding electric motors and in repairing and installing electrical wiring were commercial or industrial firms, employer was not a ‘retail or service establishment’ within provision of Fair Labor Standards Act exempting employees of such establishments . . .”

It is then implied that appellant serves commercial or industrial firms so that it can be brought within the ruling of the above case. Appellant specifically stated that the work is “in connection with its retail service business of insulating homes.”

Appellee states that the implication of appellant's contention is that the Administrator has the burden of disproving exemptions. What appellant desires

is an honest-to-goodness hearing on the Order to Show Cause. Appellant wants an opportunity to prove that it is not within the Act. As stated on page 28 of appellant's opening brief :“It seems to us a mockery of Justice that in America, a litigant must plead with the Courts TO BE HEARD.”

Probable Cause

Appellee (Appellee's Brief, p. 17) argues that there is probable cause to support the issuance of the Administrator's subpoena, although he thinks that the “decisions requiring some showing of ‘probable cause’ place a heavier burden on the Administrator than is warranted.” (Appellee's Brief, p. 18).

Appellant thinks that the Fair Labor Standards Act imposes on the district court, at the very least, the duty of satisfying itself that the Administrator has reasonable ground for believing that appellant's business is subject to the Act. No such showing was made, or even attempted, in the instant case. The Administrator merely asserted, upon information and belief, that appellant is engaged in interstate commerce or in the production of goods for interstate commerce; and further, also upon information and belief, that he had reasonable grounds for believing that appellant had repeatedly violated the Act. Appellant specifically denied being engaged in interstate commerce or the production of goods for interstate commerce, and also alleged that it was a retail

service establishment within the exemption of the Act, all being supported by affidavits of fact.

Section Nine of the Federal Trade Commission Act, which is incorporated into the Fair Labor Standards Act, expressly gives the district court discretion in the issuance of such subpoena as sought. It calls for the exercise of the independent judgment of the district court. It does not contemplate blind approval of unsubstantiated administrative action where jurisdiction is completely denied. There is nothing to be inferred to the contrary from the Endicott-Johnson case. With regard to the Walsh-Healey Act there under consideration, the Supreme Court said: "It is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." The procedure of the Secretary of Labor in that matter was strictly in accordance with the provisions of the Walsh-Healey Act. Endicott-Johnson production was admittedly devoted in part to government contracts and subject to that Act. It is true that originally the Supreme Court had accepted the case partly because of possible conflict with *General Tobacco & Grocery Co. v. Fleming*, 125 F. 2d 596, 140 A.L.R. 783, which held that in a Fair Labor Standards case, coverage must be proved as a prerequisite to enforcement. The opinion, however, was confined solely

to interpretation of the Walsh-Healey Act. It is so construed in *Walling v. Benson*, 137 F. 2d 501, 506. There, as here, the Administrator made no showing at all. The entire basis of that decision is that the Administrator must show the equivalent of probable cause in order to have the district court issue such subpoena, with the court holding that the extent of the showing in an individual case "must necessarily and fundamentally be left to the sound discretion and judgment of the district court." The *Benson* matter was sent back to the district court to permit the Administrator "to amend his application, if he can and wishes to do so, to allege that he has reasonable ground to believe that appellee's business is subject to the Act, as a basis for any showing that he is able and may desire to make on the further hearing in the district court."

Appellee states that the case of *Bowles v. Glick Bros. Lumber Co.*, 146 F. 2d 566, decided an issue similar to the one here under consideration. A reading of the quotation from that case on page 7 of appellee's brief, clearly reveals that the important question of jurisdiction was not there considered. In that case it was said: "The existence of probable cause for believing that the Act has been violated is not made a prerequisite to inspection . . ." Appellant contends that there must be probable cause for believing that the Act applies to the particular business, here appellant.

Appellee contends that the purchasing of goods

outstate (p 19) constitutes interstate commerce, citing in support thereof *Fleming v. Jackson Paper Co.*, 63 Sup. Ct. 332.

In that case, the United States Supreme Court made it clear that a retailer, such as appellant, who purchased goods outside the state for sale within the state, was *not* within the Act, by stating: "... the exemption for retailers contained in section 13(a) (1) was to allay the fears of those who felt that a retailer purchasing goods from without the state might otherwise be included."

Phillips v. Walling, 144 F. 2d 102, and *Walling v. Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331, both dealt with chain store organizations and clearly do not support the above contention of the appellee.

The decision of the District Court should be reversed and the order herein appealed from vacated.

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No. 10988

United States
Circuit Court of Appeals
For the Ninth Circuit

DETWEILER BROS., INC., a Corporation,
Appellant,

vs.

L. METCALFE WALLING, Administrator of the
Wage and Hour Division, United States
Department of Labor, Appellee.

Petition for Rehearing

Upon Appeal from the District Court of the United States
for the District of Idaho
Southern Division

HON. CHASE A. CLARK, District Judge

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Filed _____, 1946

_____, Clerk

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CLERK

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PETITION FOR REHEARING

TO THE HONORABLE UNITED STATES CIR-
CIPIT COURT OF APPEALS FOR THE NINTH
DISTRICT:

Appellant herein respectfully petitions the Court
that a rehearing be granted in this matter.

As grounds therefore Appellant states:

I.

The Supreme Court in the case of Oklahoma Press Publishing Company v. Walling, 66 Supreme Court 494, confirmed the general power of the Administrator to make investigations for violations of the Fair Labor Standards Act and confirmed the authority and jurisdiction of the Federal Courts to order the production of records in proper cases in aid of such investigations by the Administrator. The *procedures* by which the powers and authority of the Administrator and the courts are to be exercised, however, were not fully set out by the Supreme Court in that decision; and Appellant submits that such procedures have not been adequately considered by this court in its opinion heretofore filed in this matter.

II.

In its opinion heretofore filed in this case, this court stated:

“All of the materials whose production is
required by the order of the District Court ap-

pear to be relevant to the inquiry of whether or not the Fair Labor Standards Act has been violated." (Opinion, Page 3).

It is respectfully submitted that the test of relevancy in this case is not as to whether the materials whose production is required are relevant to a violation of *any* of the provisions of the Fair Labor Standards Act, but rather whether such materials are relevant to the violations which the Administrator has purported to tell the court that he proposes to investigate.

III.

In this case, the Administrator attempted to represent to the lower court that he was conducting an investigation to determine whether Appellant had violated certain specified Sections of the Fair Labor Standards Act. This court affirmed the order for production of records, however, not because such records were found relevant to what the Administrator might be investigating but because they were found to be relevant to a different and broader investigation, namely, an investigation as to whether the appellant had violated any provisions of the Act.

IV.

As pointed out in Appellant's supplemental brief, the Administrator's application is hopelessly ambiguous as to what the scope of his investigation purports to be. Now, it is submitted, the opinion of the court puts a premium on ambiguity by affirming the order of the lower court on a theory not

justified by the pleadings in this case. Such a result is inconsistent with accepted rules of practice and procedure and seems to be particularly unwarranted in a case of this kind where appellant's constitutional rights of privacy should be limited only to the extent clearly required by the public interest.

V.

Appellant fully appreciates that the appeal here is not from the subpoena of the Administrator but from the order of the lower court. This case is, however, clearly distinguishable from the case *Hagen v. Porter*, CCA 9th, 156 Federal 2nd 362. In that case, the order of the United States District Court *restricted* the terms of an administrative subpoena. In this case, the court has in effect *broadened* the scope of an inquiry sought to be made by the Administrator; and Appellant earnestly contends that an order can no more be reviewed on appeal without reference to the application for the order than can a judgment in a civil case be reviewed on appeal without reference to the plaintiff's complaint.

Respectfully Submitted,

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